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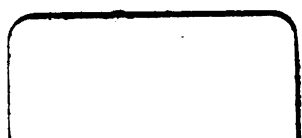
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THE
REVISED REPORTS

BEING

A REPUBLICATION OF SUCH CASES

IN THE

ENGLISH COURTS OF COMMON LAW AND EQUITY,

FROM THE YEAR 1785,

AS ARE STILL OF PRACTICAL UTILITY.

EDITED BY

SIR FREDERICK POLLOCK, BART., D.C.L., LL.D.,
OF LINCOLN'S INN.

ASSISTED BY

O. A. SAUNDERS, J. G. PEASE AND ARTHUR B. CANE,
(EQUITY CASES.) (COMMON LAW CASES).

ALL OF THE INNER TEMPLE,
BARRISTERS-AT-LAW.

VOL. LXV.

1843-1845.

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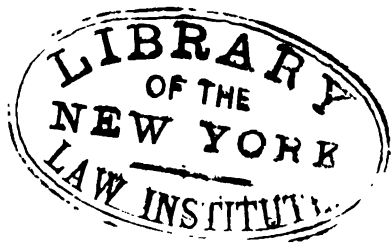


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PREFACE TO VOLUME LXV.

Brown v. Boorman, the first case in this volume, has already been dealt with in the Preface to Vol. LXI., where the decision below is reported. It is followed by two more celebrated cases, those of the *Sussex Peerage*, p. 11, and of *O'Connell*, p. 59. The actual point on the Royal Marriage Act decided in the *Sussex Peerage* case is not of frequent professional utility, but the incidental determinations and discussion of points of evidence are constantly referred to. Lord Campbell committed himself (p. 30) to a rash interlocutory observation as to the proof of foreign law, which was promptly corrected by Lord Brougham. As a matter of fact, the mere text of foreign codes and other books of authority is constantly misleading; an English lawyer is hardly safe even among American reports, unless he has some general knowledge of the constitutional provisions which have materially affected the legislation and jurisprudence both of the United States and of the several States of the Union; and the same remark applies to the Dominion of Canada, *mutatis mutandis*, and will soon apply to the Commonwealth of Australia. *O'Connell's* case is an important authority on criminal procedure and pleading, but is perhaps chiefly memorable as having been the occasion of definitely fixing the understanding that lay members of the House of Lords abstain from taking any part in the decision of appeals (pp. 214—217). That understanding, though wholly lacking formal sanction, has been observed ever since; it may now be regarded as part of our unwritten constitution. The Appellate Jurisdiction Act of 1876 requires at least three specially qualified persons to be present at the hearing of an appeal in the House of Lords, and it provides for sittings

being held by the Lords of Appeal, in the name of the House, during a dissolution, if so authorised by Royal sign manual. Otherwise the strict legal right of every lord of Parliament to sit and vote at the hearing of an appeal, as well as at any other business of the House, remains untouched. Such divergences between the letter and the spirit of the Constitution are probably to be found, at this day, only in England. It is believed that one or two eccentric individual attempts to break the understanding have been made and quietly disregarded.

Charter v. Trevelyan, p. 305, is a remarkable case of setting aside a purchase on the ground of concealed fraud after a long lapse of time.

Viscount Canterbury v. Att.-Gen., p. 393, is material on the limits within which a subject is entitled to the benefit of a petition of right against the Crown; but its chief historic interest is in the fact that the claim was by the Speaker for damage to his property in the fire which consumed the Houses of Parliament in 1834. The fire arose from the burning of the "old sticks called tallies" with which the accounts of the nation were kept in the Exchequer: this operation, as we read in the Annual Register, was "improperly entrusted by the clerk of the works to a workman named Cross," and a committee of the Privy Council found that it was carried out with "gross neglect, disobedience of orders, and utter disregard of all warnings." A curious circumstance is that one Cooper, an apparently respectable tradesman, told this committee that, being at the time on a journey to the Midlands, he heard of the fire some hours before the news could have arrived in ordinary course, and concluded that it must be the work of an incendiary. He wholly failed, however, to corroborate his story: in particular, a conversation with a waiter at Oxford, after the news was known there, was shown by the waiter's evidence to be imaginary as to everything alleged as material for that purpose; and the committee said in plain terms that, without charging Cooper with deliberate falsehood, they did not believe him

"It is not contrary to experience that witness may be false," as a Cambridge undergraduate is supposed to have said in answering a paper on Paley's "Evidences"; and there are many historical puzzles for which we have to be content with no more definite solution. In the good old days of uncritical history many men posed as heroes or villains on testimony worth about as much as Mr. Cooper's.

In Chancery we find a late example of that process whose very name should have been a terror to dilatory defendants, a commission of rebellion (p. 451). This defendant's name suggests reminiscences of the generation which was then passing away; William Cobbett, the author of the delightful "Rural Rides," and much other more controversial and less readable matter, had died in 1835. Railways are becoming familiar, and Shadwell, V.-C., expatiates on the modern facility of travelling by steam (p. 536).

Cole v. Sewell, p. 668, is a classical exposition of real property law by Sir E. Sugden.

Quarrier v. Colston, p. 351, touches on more than one rather speculative question in the conflict of laws, and is instructive on the principles involved, though the actual decision is probably of very limited application.

The frequency of charity cases will be observed, and also (for some less obvious reason) of decisions on the privileged character of communications with legal advisers.

It has been found necessary to increase our editorial strength with a view to more rapid production; and it may be useful to state that Mr. Saunders deals in the first instance with equity cases, while common law cases are divided between Mr. Cane and Mr. Pease. The Privy Council reports (without prejudice to my general responsibility as editor of the whole) are in my own hands.

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OF THE
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1843—1845.

(6 & 7 VICT.—8 & 9 VICT.)



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SIR JOHN WILLIAMS, 1834—1846 . . .	
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SIR THOMAS COLTMAN, 1837—1849 . . .	} <i>Judges.</i>
(1) THOMAS ERSKINE, 1839—1844 . . .	
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SIR C. CRESSWELL, 1842—1858 . . .	
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SIR EDWARD BURTENSHAW SUGDEN . . .	{ <i>Lord Chancellor of Ireland.</i>
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(1) The description of Mr. Justice Erskine as a knight in the earlier volumes of Manning and Granger's Reports was erroneous. As a peer's son he would not have been knighted in the ordinary course; and the lists of the Judicial Committee in Moore's Privy Council Reports, and of the Benchers of Lincoln's Inn in the Law List down to 1863 (confirmed by the description of the Right Hon. Thomas Erskine in a deed of which a copy is before me), show that in fact he was not.—F. P.

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VOL. LXV.

IN THE HOUSE OF LORDS.

RICHARD THORNTON BROWN v. THOMAS HUGH
BOORMAN AND OTHERS (1).

(11 Clark & Fennelly, 1—44.)

Broker—Pleading.

In case, the declaration alleged that A. employed B. as a broker, to sell and deliver oil, on the terms contained in such contracts of sale as should be made with persons who should become purchasers thereof, for reasonable commission to B. : that B. accepted the employment, and sold oil to C. on the terms of payment on delivery : that it thereupon became the duty of B. not to deliver the oil without payment : that B. delivered the oil to C., but did not obtain payment, whereby the plaintiff was damnified : Held that this declaration set forth a good cause of action : that the duty of B. arose out of the contract : and that, after verdict, judgment could not be arrested.

Wherever there is a contract, and something is to be done in the course of the employment which is the subject of that contract, if there is a breach of duty in the course of that employment, the party injured may recover either in tort or in contract.

THIS action was brought by the defendants in error to recover from the plaintiff in error the damages which they alleged they had sustained by the negligent and improper conduct of the plaintiff in error.

The declaration, which was in case, contained the following allegations :

For that whereas, before, &c., the said plaintiffs carried on the trade or business of linseed-crushers at *Branbridges, in the county of Kent, and the defendant during all that time carried on the trade or business of an oil-broker at London aforesaid : and whereas

(1) See the report below, 61 B. B. *Courtenay v. Earle* (1850) 10 C. B. 73, 287, and cases there noted. See also 20 L. J. C. P. 7.

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also, on the 1st day of January, 1836, the said plaintiffs had retained and employed the said defendant, as such broker as aforesaid, to sell at London aforesaid, for and on the behalf of them the said plaintiffs, certain quantities, to wit 30 tons, of linseed oil, and to deliver the same in the port of London aforesaid, according to the terms of the contract or contracts of sale, to such person or persons as should become the purchaser or purchasers thereof, for certain reasonable commission and reward to him the said defendant in that behalf; which said retainer and employment the said defendant then accepted: and whereas also the said defendant, as such broker as aforesaid, in pursuance of the said retainer and employment, and being duly authorised by the plaintiffs and one J. G. P. in that behalf, made a certain contract between the plaintiffs and J. G. P., whereby the plaintiffs sold to J. G. P., and J. G. P. purchased of the plaintiffs, the said 30 tons of linseed oil, at the price of &c., to be delivered in parcels, the amount of each parcel to be paid for from delivery, in ready money; which said contract the plaintiffs and J. G. P. then respectively accepted.

[*3]

The declaration then alleged the consignment of part of the cargo to the defendant, and the delivery of and payment for two parcels according to the contract, and proceeded thus: and whereas also after, &c., the plaintiffs consigned to the defendant, as such broker as aforesaid, 10 other tons of linseed oil, being the residue of the 30 tons comprised in the contract, to be delivered by him the defendant to J. G. P., upon payment of the price thereof by J. G. P. to the defendant; and the said last-mentioned *10 tons of linseed oil being so consigned, afterwards, &c. arrived in London; of all which the defendant then had notice, and then took upon himself the delivery of the said last-mentioned 10 tons of linseed oil, according to the terms of the contract; and thereupon it became and was the duty of the said defendant, as such broker as aforesaid, to use all reasonable care and diligence that the said 10 tons of linseed oil should not be delivered to J. G. P., or any other person, without the price thereof being paid to him the defendant, according to the terms of the contract; yet the defendant, not regarding his said duty, but contriving and intending to defraud and injure the said plaintiffs, did not nor would use reasonable care and diligence that the said last-mentioned 10 tons of linseed oil should not be delivered to J. G. P., or any other person, without the price thereof being paid to the said defendant, but wholly neglected and refused so to do, and so negligently and carelessly behaved in the premises,

that by and through the mere carelessness and negligence of the defendant the said last-mentioned 10 tons of linseed oil were delivered to certain persons, &c. without the price for the same or any part thereof being paid by J. G. P., or any other person, to the said defendant; by reason whereof, &c. the plaintiffs have lost and been deprived of the said oil, and the price and value thereof.

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The defendant pleaded, first, not guilty; secondly, that he did not undertake to deliver in manner and form, &c.; and, thirdly, that the plaintiffs had not employed, nor had the defendant accepted employment as such broker to sell and deliver in manner and form, &c. Issue was taken on all these pleas.

The cause was tried before Lord Denman, at the *sittings after Hilary Term, 1839, and the jury returned a verdict for the plaintiffs below upon all the issues, with damages 425*l*. In the following Term the defendant below moved in arrest of judgment, for the badness of the declaration, insisting that the declaration showed no good cause of action; and that if it did, the form of action should have been *assumpsit*, and not *case*. In Trinity Term, 1841, the Court of Queen's Bench gave judgment for the defendant below, on the ground that the declaration did not state a good cause of action (1).

[*4]

The plaintiffs below thereupon brought a writ of error in the Exchequer Chamber, assigning for error that the declaration did state a good cause of action, and that judgment ought to have been given for them. On the 21st of June, 1842, the Court of Exchequer Chamber, after argument, reversed the judgment of the Court of Queen's Bench, and gave judgment for the plaintiffs below (2).

The present writ of error was then brought by the defendant in the original action.

Mr. Butt and *Mr. J. W. Smith*, for plaintiff in error (defendant below):

The action in this case is misconceived. The remedy was by an action of contract, and not by an action on the case. The obligation here, which is alleged to have been broken, is not one which would have existed at common law, and would have been implied at law to arise from the character of the broker as such. It is the result of a special contract. The breach stated is not that which relates to the common-law character of broker, but to the special duty of not delivering without payment of price. The action is therefore misconceived.

(1) 61 R. R. 287 (3 Q. B. 511).

(2) 61 R. R. 297 (3 Q. B. 525).

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(LORD BROUGHAM: Originally there must have been but *a slight difference between tort and contract, as the words of the breach in assumpsit itself, "fraudulently contriving," clearly show.)

It is, no doubt, so; but the difference is now well established. *Slade's* case (1) shows that an action on the case lies on contract as well as debt. But that was case on assumpsit, the nature of the writ depending on the nature of the complaint for which the plaintiff sought a remedy.

[They cited *Coggs v. Bernard* (2), *Burnett v. Lynch* (3), *Govett v. Radnidge* (4), *Pozzi v. Shipton* (5), *Marzetti v. Williams* (6), and other cases.]

June 3.

Mr. Erle and *Mr. Cleasby*, for the defendants in error :

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This declaration is perfectly good. The action is maintainable in the form of tort, in respect of the general duty of a broker. * * *

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Two propositions are to be supported here. First, that this cause of action sounds in tort, and that a good cause of action appears on the face of the declaration; and next, that there is a good cause of action in trespass on the case. There is an employment for a particular purpose. *The plaintiffs below entrust the defendant below with their goods: he takes on himself the sale and delivery of their goods, and so misconducts himself in the employment that they lose the value of their property. The ground of action sounds in deceit, and the plaintiffs may therefore maintain an action on the case.

[*21]

[They referred to, in addition to the cases cited for the plaintiff in error, *Smith v. Lascelles* (7) and *Parnaby v. Lancaster Canal Co.* (8).]

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LORD BROUGHAM :

This case has been very ably argued, and great assistance has been given to the House by the arguments of the learned counsel at the Bar, on the one side and the other. I am of opinion that there is set forth upon this declaration, as the learned Judges appear to have thought in the Court of Exchequer Chamber, a specific contract between the parties. The contract is that of the retainer and employment of the defendant, by the plaintiffs, to sell

(1) 4 Co. Rep. 92 b.

(2) 2 Ld. Ray. 909; Comyns, 133;

1 Salk. 26.

(3) 29 R. R. 343 (5 B. & C. 589).

(4) 6 R. R. 539 (3 East, 62).

(5) 47 R. R. 802 (8 Ad. & El. 963).

(6) 35 R. R. 329 (1 B. & Ad. 415).

(7) 1 R. R. 457 (2 T. R. 187).

(8) 52 R. R. 329 (11 Ad. & El. 223).

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their oil to such persons as should become the purchasers thereof, for certain reasonable commission and reward to him the said defendant, in that behalf; that is to say, some proportion being kept between the price of the article and the reward, for that is the very force and effect of the term "commission," and that shows it to be discretionary, and in the nature of an executory contract. Then it is alleged that this retainer and employment were accepted by the defendant. It is then specifically alleged that the plaintiffs consigned to him certain oils, and that those oils being so consigned afterwards arrived in the port of London, where he carried on the trade of a broker; that he had notice of the arrival of the said oils so consigned to him, and that he took upon himself the delivery of the 10 tons of linseed oil in question, according to the terms of the said contract. I thought that perhaps that might mean according to the terms of the general contract made between him and his employers, but it is not so; it is the contract he had made with the purchasers of the oils, he having made a contract with those purchasers in virtue of his profession as a broker. A breach is then assigned, in a manner to which I understand there is no objection.

This being the case, it appears to me that the Court *of Exchequer Chamber has come to a right conclusion; which renders it wholly unnecessary, in the view which I take of the case, to ask whether the Court of Queen's Bench was right in its view of the office of a broker, namely, that he was not to do more than to make contracts; that he was not to obtain a ready-money price for the goods he should sell, or even to sell goods consigned to him, which indeed is rather the office of a factor or a consignee than a broker. But a broker may be a factor or a consignee, and may contract with his employer not only to pass the property in goods, which is the proper office of a broker, but to receive the trust in the goods consigned; to have the control over those goods, which also is not the ordinary office of a broker; and to deliver those goods, and so to deliver them for such price as he might contract for, which in this case was a ready-money price. The breach is that he did not deliver them, according to the terms of that contract, for a ready-money price, but on credit, whereby the plaintiffs were damnified to the extent of the price of 10 tons.

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Being of opinion that it is by virtue of the contract that the liability arises, and that the damage arises from a breach of that contract, it is wholly unnecessary to say whether it is within the ordinary employment of a broker that he should perform this duty,

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which was the ground on which the Court of Exchequer Chamber differed from the Court of Queen's Bench; the former Court holding that there was such a contract with the defendant, a broker, as rendered him liable, on a breach of that duty, to the party employing him, for an injury arising in consequence of his not having kept within the terms of his employment and undertaking.

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Then the question is, is this declaration, taking it altogether, sufficient to support the judgment of the Court of Exchequer Chamber? Is this declaration, after verdict, sufficient to show a contract, and a binding of himself by the terms of that contract, by this defendant, against whom the action is brought? I am of opinion that it is, and I think the authorities cited are quite sufficient for that purpose. The authorities show that, after verdict, it is immaterial whether there are or not technical words; if there are clear words to show that the defendant has made such contract and has broken it, after verdict everything will be intended that can be intended to support that verdict. All matters of form will be got rid of, to get at the substance. If the substance had been insufficient, the result would have been different. If there had been no allegation of a contract; if, for instance, there had been no allegation of a consideration, if there had been no allegation of a breach, it might have been otherwise; although, indeed, if some of the cases in Comyns' Digest, under the head "Pleader," are to be relied on, there are cases where there seems such a tendency to support the verdict, that even where there was a most deficient statement of a breach, the Courts have overlooked that, to support the verdict. But it is not necessary here to go that length; it is sufficient to see whether there is an averment that the undertaking of the defendant to the plaintiffs has not been fulfilled, and that loss has in consequence accrued to the plaintiffs.

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Now in *Mountford v. Nelson* (1), which has been cited at the Bar, there was no doubt that an agreement existed, but it was said there was no promise at *all alleged; not only no promise to the plaintiff, but no promise at all; but the Court was of opinion that whatever might have been the force of that objection on special demurrer, there was sufficient to support the verdict.

In the case of *Nurse v. Wills* (2), there was an agreement between the parties, but the promise was not stated to be to the plaintiff; nevertheless their Lordships held it was sufficient, after verdict, to support the action.

(1) 2 Bos. & P. N. B. 62.

(2) 4 B. & Ad. 739.

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Then there is the case of *Hall v. Marshall* (1), which goes a great way; in which the contract with the parties was to permit the plaintiff to take all the furze on certain premises, which he should cut, take, and carry away, on or before Michaelmas, 1635. The case only set forth the contract; and in assigning the breach, stated—for on looking into it, it appears to have been an action of *assumpsit*,—in assigning the breach, stated that he was disturbed in taking away the furze, but did not state that he took away the furze, and was so disturbed in taking them away, on or before Michaelmas, 1635. That seems to me to make out a very strong case, as indicating the disposition of the Court, after verdict, to presume every thing which can be presumed to support it. I do not think that this case goes half so far as that; I should rather be disposed to say, that in that case there was more substantial ground for the objection than in this case, which, according to the view I take, does show a contract, and a breach of the contract: I am therefore of opinion, without referring to the other part of the case, that the judgment of the Court of Exchequer Chamber must be affirmed.

I was at first staggered by the statement in *Hayter v. Moat* (2): but, in the first place, the request was not enough to show the liability. It is not enough to say that the man is liable, and that a request was made: a request does not amount to a contract: but, secondly, I was satisfied by the answer given by *Mr. Cleasby*; for on looking to the very ground of the decision, the promise to make the payment “when thereunto requested,” was not set forth; so that it was impossible to say whether the contract was performed or not. It is rather implied, that had it, after verdict, been set forth that he was to pay either on the *quantum meruit*, though no specific sum, and had it been further set forth that he had undertaken or was liable, and being indebted, had become liable to pay when called

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(1) Cro. Car. 497.

(2) *Mr. Cleasby* was allowed to observe on the case of *Hayter v. Moat*,† which had been cited for the first time in the reply:

The declaration there did not state that the defendant was indebted to pay on request, but left it doubtful whether the allegation of indebted might not be a *debitum in præsentī*, *solvendum in futuro*. Mr. Baron

PARKE there said, “You do not even state that the defendant was indebted to pay on request; it is quite consistent with your statement that he was to pay on six months’ credit. We must find premises stated on which the law will imply a promise to pay on request.” And Mr. Baron ALDERSON added, “You only state a *debitum*, not *solvendum in præsentī*.” That case is therefore inapplicable to the present.

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upon, that would have been sufficient. Upon the whole I am of opinion with the Court below, and shall move your Lordships to give judgment for the defendant in error.

LORD COTTENHAM :

My Lords, I am of opinion that the Court of Error came to a right conclusion, and I concur with the reasons stated by my noble and learned friend. It appears to me perfectly clear that the declaration correctly states a case of neglect of duty. The action being an action of trespass on the case, it states that the defendant undertook, for a certain commission or reward, to sell for the plaintiffs certain quantities of linseed oil, and to deliver the same according to the terms of the contract of sale: then it alleges the contract, the terms of the sale being that the oil should be paid for on delivery.

[*41]

Then with respect to the 10 last tons of linseed oil, *which are the subject-matter of the action, it is alleged in terms, that the defendant delivered them without having received the money. The case therefore, if stated at length, is that he had undertaken this employment for a commission, and had not fulfilled the duty he had undertaken; the declaration being in tort, which it is admitted would be the proper mode and form of action, if the duty to be performed had been an ordinary duty; and therefore the CHIEF JUSTICE, in delivering the judgment in the Exchequer Chamber, concludes in these words: "Coupling together the terms of the particular contract made by the defendant, with the terms of the defendant's retainer by the plaintiffs, we think it amounts to an express contract on the part of the defendant to deliver what he sold on the payment of ready money only; and that the duty of the broker arose from this express contract so stated in the declaration, and not simply from his character of broker." It appears therefore, according to the facts, that the broker had undertaken the duties imposed upon him by virtue of the contract into which he had entered with the plaintiffs, and that he had neglected to perform the duties, by parting with the oil without receiving the money. The question raised is, whether the Court of Exchequer Chamber was in error upon this point. I think it was not. I am of opinion, that under these circumstances the remedy pursued in the present case was the proper remedy. The contract was specially made; and, on the authorities referred to, the broker's duty must depend upon the contract expressed or implied into which he entered, and it is difficult to conceive a case

in which a contract of this sort must not be special ; it must have reference to the price of the goods, and the terms on which they are to be *sold ; and it is difficult to conceive a case in which there is not something passing between the broker and his employer to regulate the contract. It is said that the proper form of proceeding is by an action of assumpsit, and not an action on the case. The cases referred to disprove that proposition altogether ; and the terms of the LORD CHIEF JUSTICE are, that this is a proper remedy where there are duties imposed upon the party, though they are imposed by an express contract, and are not what are called the ordinary duties imposed on brokers as such. That being the only ground on which the judgment of the Exchequer Chamber appears to have been impeached, I am of opinion that it fails, and that the judgment of that Court is correct, and ought to be affirmed.

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[*42]

LORD CAMPBELL :

My Lords, after having heard this case very ably argued on both sides, I have come to the conclusion that the judgment of the Court below ought to be affirmed. In the first place, I think this declaration sets out a sufficient cause of action ; it alleges a binding contract between the parties ; that the plaintiff employed the defendant as a broker for a certain reward to do certain things, and that he undertook that employment ; which is tantamount to saying that the plaintiff paid him a certain reward, and that he, in consideration of that reward, undertook that duty. The declaration then goes on distinctly to show a breach of that contract, because it alleges that the defendant having contracted that he would see the price of the goods paid, allowed the purchaser to receive them before they were paid for, whereby the plaintiff lost the value. Now that being the case, I think that, after verdict, it is immaterial to consider whether this count is framed in tort or in *contract. It sets out a cause of action for which the plaintiff is entitled to recover. The cases referred to by the counsel for the plaintiff in error do not apply, because there is no question raised here as to misjoinder or damages, plea in abatement, or whether a verdict can be sustained against one defendant and not against another. There is only one count, and there is only one defendant ; and, after verdict, the question is whether the judgment shall be arrested upon that count, by reason that there is not an express promise to pay, or an express promise to perform the agreement. Now no case has been cited to show that the judgment should be

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arrested on such a ground. The only case applying at all was that case of *Hayter v. Moat*, which, until I heard the explanation of it, did appear to me to impeach the general doctrine for which I should contend, that if the count sets out a general contract, and a breach of that contract, after verdict the Court will not arrest the judgment on account of any defect of form in setting it out. But on examining that case, it appears to have been rightly decided; for it does not show that there had been any breach of the contract, but the plaintiff merely alleged a conclusion of law, that the defendant was liable for goods supplied at his request, but that they were to be paid for at a future day, and it did not appear there that there had been any breach. I apprehend, therefore, that whether this count be in contract or in tort is quite immaterial; it is a count on the case, setting out the circumstances and facts of which the plaintiff complains; he shows a cause of action, by showing a contract, a duty, and a breach; and if so, it is a good count in an action on the case, and he is entitled to his judgment.

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But then there is a question whether this count *was a good count in law, and could not be demurred to. I think that the judgment of the Court of Exchequer Chamber is right, for you cannot confine the right of recovery merely to those cases where there is an employment without any special contract. But wherever there is a contract, and something to be done in the course of the employment which is the subject of that contract, if there is a breach of a duty in the course of that employment, the plaintiff may either recover in tort or in contract. It is impossible to say that the whole of this is not connected with the duty of the defendant as a broker in this case. It is not the duty of the broker, unless there are words importing that he is to perform such a duty, to see to the delivery of the goods on the payment of the price. But it may be the duty of the broker, under the employment he has undertaken, to see to the delivery of the goods, and to take care that the price is paid; and I apprehend, though that is connected with the capacity of a broker, an action being brought against him in that capacity, and the duty arising on a particular contract entered into between him and the plaintiff, the plaintiff has a right to declare either in contract or in tort, as he has done. Upon both these grounds, I think that the judgment ought to be affirmed.

*Judgment of the Court of Exchequer Chamber affirmed,
 with costs.*

BOURNE v. GATLIFFE.

(11 Clark & Finnelly, 45—84.)

[THIS case will be found reported along with the report in the Common Pleas, *s. n. Gatlife v. Bourne*, in 44 R. R. 723.]

1844.
June 7, 10.

Lord
BROUGHAM.
Lord
COTTENHAM.
Lord
CAMPBELL.

IN COMMITTEE FOR PRIVILEGES.

THE SUSSEX PEERAGE.

(11 Clark & Finnelly, 85—154; S. C. 8 Jur. 793.)

Royal Marriage Act—Evidence—Practice—Construction of statutes.

The Royal Marriage Act, 12 Geo. III. c. 11, extends to prohibit the contracting of marriages, or to annul any already contracted, in violation of its provisions, wherever the same may be contracted or solemnised, either within the realm of England or without.

In a claim of Peerage, where the question was whether the deceased Peer, the father of the claimant, had been married or not, a Prayer Book, found after the death of the claimant's mother among her papers, was received, and an entry made in her handwriting, declaring the fact of the marriage, read from it, not as conclusively proving that fact, but as a declaration of it made by one of the parties at the time (1). (*Infra*, p. 21.)

A will of the deceased Peer, made many years before his death, declaring, in the most solemn form, his marriage, and the legitimacy of his son (the claimant of the Peerage), was proposed to be read as a declaration made by one of the parties; but it was rejected, because the date, and certain expressions in it, showed it to have been written after a suit to annul a marriage of the deceased Peer had been instituted by his father, and because there was nothing to show that that marriage was not the very marriage in question. (*Infra*, pp. 21 to 24.)

The declarations of a deceased clergyman to his son, to the effect that he had celebrated a marriage between the deceased Peer and his alleged wife, are not receivable in evidence as the declarations of a deceased party made against his own interest; such interest not being an interest of a pecuniary nature (2).

The law does not recognise the apprehension of possible danger of a prosecution as creating an interest which can bring these declarations within the rule in favour of their admissibility in evidence upon the ground of their being declarations made against the interest of the party making them. (*Infra*, pp. 24 *et seq.*)

A professional or official witness, giving evidence as to foreign law, may refer to foreign law books to refresh his memory, or to correct or confirm his opinion; but the law itself must be taken from his evidence.

A Roman Catholic Bishop, holding the office of coadjutor to a Vicar Apostolic in this country, is, in virtue of that office, to be considered as a person skilled in the matrimonial law of Rome, and therefore admissible as a witness to prove that law.

In a claim of Peerage, where evidence has been produced for the purpose of establishing a certain point, the party who has produced it will not, should the Crown call evidence of a contradictory *kind, be allowed to produce additional evidence confirmatory of the first.

Before the claimant's junior counsel summed up the evidence previously

1844.
May 13.
June 13, 25,
28.
July 9.
Lord
LYNDHURST,
L.C.
Lord
BROUGHAM.
Lord
CAMPBELL.
Lord
DENMAN.
Lord
COTTENHAM.
Lord
LANGDALE.
TINDAL,
Ch. J.
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(1) *In re Lambert* (1886) 36 L. J. Ch.
122.

(2) *Smith v. Blakey* (1867) L. R. 2
Q. B. 326, 332, 334, 36 L. J. Q. B. 156.

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to the opening of the case on the part of the Crown, the counsel for the Crown were required by the Committee to declare whether they would or would not call evidence on a question of foreign law, so as to enable the claimant's counsel to determine whether they would then (as they could not afterwards) produce any additional evidence on that question.

By the Judges: The rule for the construction of Acts of Parliament is, that they should be construed according to the intent of the Parliament which passed the Act. If the words of the statute are of themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense. The words themselves do, in such case, best declare the intention of the Legislature (1).

Soon after the death of his Royal Highness the Duke of Sussex, in the year 1843, a petition was presented to her Majesty by Augustus Frederick D'Este, claiming the honours, dignities, and privileges of Duke of Sussex, Earl of Inverness, and Baron of Arklow.

This petition, stating the grounds (2) upon which the claim rested, was referred by her Majesty to the *Attorney-General* to consider and report thereon. Evidence in support of the claim was laid before the *Attorney-General*. The facts, as they appeared from the petitioner's printed case, were these: His late Royal Highness, Prince Augustus Frederick, was the sixth son of his late Majesty George III.; in 1798 he went to Rome, and on the 4th of April in that year intermarried with Lady Augusta Murray, the second daughter of the Earl and Countess of Dunmore; that marriage was celebrated by a clergyman of the Church of England, in a form as nearly as could be according to the rites of the Church of England, an English Prayer Book being used upon the occasion; and it was contracted and attested by two papers *signed by his Royal Highness and by Lady Augusta, which papers were in the following terms:

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“As this paper is to contain the mutual promise of marriage between Augustus Frederick and Augusta Murray, our mutual names must be put here by us both, and kept in my possession; it is a promise neither of us can break, and is made before God our Creator and all-merciful Father.”

“On my knees before God our Creator, I Augustus Frederick promise thee Augusta Murray, and swear upon the Bible, as I hope for salvation in the world to come, that I will take thee Augusta Murray for my wife; for better for worse; for richer for poorer; in sickness and in health; to love and to cherish till death us do part; to love but thee only, and none other; and may God forget

(1) *Cargo ex “Argos”* (1873) L. R. 37 L. T. 543.
5 P. C. 134, 153, 28 L. T. 745; *River* (2) See *Lords Journ.* for 22nd
Wear Commissioners v. Adamson (1877) August, 1843.
2 App. Cas. 743, 778, 47 L. J. Q. B. 193,

me if I ever forget thee. The Lord's name be praised! So bless me! So bless us, O God! And with my handwriting do I Augustus Frederick this sign, March the 21st, 1793, at Rome; and put my seal to it, and my name.

(L.S.) "AUGUSTUS FREDERICK."

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"(Completed at Rome, April 4th, 1793.)"

"On my knees before God my Creator, I Augusta Murray promise and swear upon the Bible, as I hope for salvation in the world to come, to take thee Augustus Frederick for my husband; for better for worse; for richer for poorer; in sickness and in health; to love and to cherish till death us do part. So bless my God, and sign this.

"AUGUSTA MURRAY."

There were duplicates of these papers; and in the first of them, the words "Married, April 4th, 1793, *Rome, 7 o'clock at night," were introduced in the place of the words "Completed at Rome, April 4th, 1793." The latter words were added on the day thus mentioned, in the handwriting of his Royal Highness.

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The petitioner's case further stated that the parties were again regularly married in England, and that the petitioner was born in the parish of St. Marylebone, in the county of Middlesex, on the 13th January, 1794; and the petitioner was the only male issue of the marriage: That by letters patent, dated on the 27th November, 1801, his Royal Highness, Prince Augustus Frederick, was created a Peer of the realm, by the titles of Baron Arklow, Earl of Inverness, and Duke of Sussex, with limitation to the heirs male of his body; and that his Royal Highness afterwards sat and voted in Parliament, and died on the 21st April, 1843, leaving the petitioner his only son and heir male him surviving.

The *Attorney-General*, on the 21st August, 1843, made a report to her Majesty, in which he said, "It appears to me, on the testimony laid before me, that it is established that the contracts of marriage above set forth were entered into by his late Royal Highness the Duke of Sussex and the Lady Augusta Murray, at Rome, on the 21st of March, 1793; and I think it may be inferred that his late Royal Highness the Duke of Sussex and the Lady Augusta Murray considered that they stood in the relation of husband and wife." He then expressed his doubts of the fact of any marriage, valid by the laws of England, having been contracted, even independently of the Royal Marriage Act (12 Geo. III. c. 11); and declared that he was not satisfied with the correctness of certain opinions which were laid

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before him, stating that Act to have no binding force on parties living out of England. He *therefore recommended her Majesty to refer the petition to the House of Lords. Her Majesty was pleased to adopt this recommendation; and on the 22nd of August the petition, together with the *Attorney-General's* report, was referred to the House of Lords, and by the House to the Lords Committees for Privileges.

At the first sitting of the Committee for Privileges, on the 7th of June, 1844, the Earl of Shaftesbury in the chair, the Lord Chancellor, Lord Brougham, Lord Denman, Lord Cottenham, Lord Langdale, Lord Campbell, and other Lords being present; and Lord Chief Justice Tindal, Lord Chief Baron Pollock, and Justices Patteson, Williams, Coltman and Cresswell, and Baron Parke, attending:

Sir T. Wilde (Mr. Erle and Mr. James Wilde were with him) opened the case for the petitioner:

There will be no difficulty in this case in proving the petitioner to be the only son of the late Duke of Sussex. The fact of the marriage will also be easily established, and the only question will be as to the validity of that marriage. The marriage was a valid marriage by the laws of England, independently of the Royal Marriage Act. And it is submitted that that Act does not impeach its validity. The correspondence between the parties, both before and after the marriage (many parts of which were put in and read) proves beyond doubt that the object they had in view was marriage, and nothing else. The Prince appeared to imagine that if married at Rome, he should, especially after he was 21, be able, notwithstanding any opposition, to have his marriage celebrated in England. It appeared that Protestants at Rome had considerable difficulty in celebrating marriages between themselves. The Roman priests could not celebrate such marriages, and the laws of Rome did not recognise any marriage, except those *which were celebrated according to the Roman Catholic ritual. In this situation of things, the Prince had recourse to the Rev. Mr. Gunn, an ordained minister of the Church of England, who happened to be at that time in Rome for the purpose of discovering and collecting the Stuart papers. After long-repeated importunities, Mr. Gunn consented to celebrate the marriage; and the fact would be placed beyond all doubt that he did celebrate it according to the rubric of the Church of England, with every form that circumstances enabled him to employ, in order to give it force and validity. This marriage is, therefore, a valid marriage by the laws of England, as a foreign marriage made at a

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place where no other form of marriage was open to the parties. Or, if denied to be a marriage valid, according to the laws of England, as strictly a marriage celebrated according to the General Marriage Act, then it is valid as a contract of present relation of husband and wife, and may be considered as if made between two parties in a desert island in the ocean, where no laws existed, and where the solemn and declared intentions of the parties must, from the necessity of the case, constitute the marriage: or as made at a place where only one form of marriage was open to the parties, and they married by that form; in which case their marriage would undoubtedly be good according to the laws of England.

The question upon the statute then arises: assuming the marriage to be perfectly valid and unobjectionable by English or Roman law, the question arises whether it is avoided by reason of the Act of Parliament commonly known as the Royal Marriage Act, one of the parties to the marriage being a descendant of Geo. II.? In order to try the effect of that circumstance, and the construction of the Act of Parliament, the marriage must be assumed to be valid in *other respects. The material clause in that Act is in these terms:

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“That no descendant of the body of his late Majesty King George II., male or female (other than the issue of Princesses who have married or may hereafter marry into foreign families), shall be capable of contracting matrimony, without the previous consent of his Majesty, his heirs or successors, signified under the Great Seal, and declared in Council (which consent, to preserve the memory thereof, is hereby directed to be set out in the licence and register of marriage, and to be entered in the books of the Privy Council); and that every marriage or matrimonial contract of any such descendant, without such consent first had and obtained, shall be null and void to all intents and purposes whatsoever.”

Is this Act confined to marriages contracted in England, or in British territories, or does it affect to enact prohibitions on British subjects marrying anywhere and under any forms of law? It cannot have this latter operation. Its obligations and prohibitions must be confined to marriages contracted within British territories. There are two cases on this subject, one of which is directly in point: *Swift v. Swift* (1) is a case where the parties were married in Rome. There, both parties were British subjects and Protestants, and by the law of Rome no Protestant religious ceremony could be celebrated between them. Their marriage was, therefore, not made

(1) 40 B. R. 22 (3 Knapp, 257).

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according to the English law. Nor by our law would it have been good in another view of the matter; for in order to get married they had fraudulently pretended to be Roman Catholics, and had made profession of that faith, and had been married according to the form of *the Roman ritual. The Arches Court, on the ground of the fraud, had declared the marriage invalid (1); but the Privy Council reversed that decision, as neither party had been deceived as to the person with whom the contract was made, and as the marriage had been good by the forms of the Roman law. The next case is that of *Lord Cloncurry* (2). There a divorce bill was introduced into the Legislature, and it became necessary to ascertain whether there had been a valid marriage. Both the parties there were Protestants. They had been at Rome; and not being able, as Protestants, to have the marriage ceremony performed according to the law of the place, they were married by an English priest, as the parties have been in the present instance. When the bill was argued at the Bar of this House, Lord ELDON desired to know what was the law at Rome as to the marriages of Protestants. Witnesses were examined, and it was proved that by the law of Rome, and the effect of the Council of Trent, Protestants could not be married at Rome; it was also proved that these parties had been married *per verba de presenti*, in the presence of an English clergyman, and this House held the marriage to be valid. These two cases are decisive of the present.

(LORD BROUGHAM: *Lord Cloncurry's* case does not much affect the matter; for that was a divorce bill, where but slender proof of marriage is required, as the marriage is set up merely to be knocked down again.)

Suppose that the husband there had been a descendant of Geo. II., that would not have rendered the marriage invalid; the Royal Marriage Act creates no incapacity.

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The General Marriage Act has always been treated by the Courts as one creating disabilities and as *restricting the exercise of natural rights, and therefore requiring to be strictly construed. That objection applies with infinitely greater force to the Royal Marriage Act. The first objection to the Act arises on its vague and indefinite character. It affects to apply to the descendants of Geo. II. Does it apply to them for a restricted and limited period

(1) 3 Knapp, 303.

p. 276 (ed. 1823). The name of the

(2) Cruise on Dignities, cvi. s. 85, case is not mentioned,

only, or for ever? If the latter, how many persons are subject to its operation? And are they subject to it from their birth, or do they become so only under particular circumstances, and at particular periods of their lives? Are all the remote descendants of Geo. II., who and whose parents may have lived abroad, away from the operation of the laws of this country, and perhaps ignorant of their existence, are they all to be subjected to the provisions of this Act, and to be incapable of marrying except with the consent of the Sovereign of this country? No one can pretend that an English statute can have such a universal effect. A statute creating an incapacity must, according to the rules of English law, apply to some definite time, or place, or person. This statute, though creating an incapacity, does nothing of the sort. To give effect to such a statute, all the ordinary rules of construction must be abandoned, and a course adopted hitherto unknown to the law; intention must be guessed at, and the general rules of the law violated, in order to enforce it. The Act itself excepts from its operation the issue of Princesses who have been married, or who may marry, into foreign families. This shows that it was intended to have a very restricted operation, and not to apply to all those who, by the chances of events, might come to have a claim to the succession to the Crown. If the Act really had any distinctive purpose of policy, here is an abandonment *of it. The persons nearest the succession to the Crown, have been those expressly excepted from its provisions. The Princess Charlotte was a Princess who married into a foreign family. By the terms of the Act, her issue would be excepted from its provisions; yet she was very near the throne; and her case, therefore, affords a proof of the extraordinary inaccuracy and looseness with which the Act was drawn, and shows it rather to have been an emanation of the Royal temper at the moment, than a well-considered and well-framed piece of State legislation. The issue of her present Majesty, had she married while a Princess, would, in like manner, have been exempt from its operation. Again, some of the provisions of the Act are incapable of execution in foreign countries. The Act requires the consent of the Sovereign signified under the Great Seal, but provides no form in which it shall be asked; limits no time within which the answer shall be given; nor affords any means by which the answer, if a negative, shall be known. While defective in all these respects, it goes on to provide in the second section, that if the answer should be in the negative, the party applying for the

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consent may give notice to the Privy Council; yet it secures no means for showing that any answer in the negative has been given, though it makes the existence of such an answer a condition precedent to the giving notice to the Privy Council; nor does it enact that the lapse of a certain time without any answer being made to the demand, shall be treated and considered as a dissent on the part of the Crown.

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The Act is open to still further objections: besides creating an incapacity (supposing it to do so), it creates a crime. The parties offending against it are subjected to forfeiture of property and to imprisonment. *What, then, must be the rules of construction applied to such an Act? It cannot be denied that the British Parliament possesses the power to impose restrictions and disabilities and incapacities on any British subject, which shall operate on him anywhere; but then the intention to do so must be clearly, plainly, and unequivocally expressed in the Act which proposes to effect such a purpose, and the Act must be so framed as to render its provisions capable of being fully carried into effect. Neither of these things can be said to be true of this Act. This rule has been applied from the earliest times to the crime of murder, and to other offences committed by British subjects beyond seas; in all of which the forms of proceeding, the extent of jurisdiction, and the means of exercising it, have been fully provided for. In all of these Acts too, the Legislature has expressly described the offence, for the punishment of which provision was thus specially made, as an offence committed "beyond the seas." Even treason, if committed abroad, can only be tried in this country under the provisions of a special statute. Is the Royal Marriage Act to receive a wider and less limited operation than the law of treason? The Legislature might have expressed such to be its intention; but it has not done so. The form of prohibition here is no higher than that which exists in many cases of civil contract; and if so, where is the instance to show that the provisions of any general enactment shall operate out of the British territory? This Act cannot be construed differently from others of the same class and kind. The words of the Act seem to contemplate only such marriages as took place within the British territory. The details, such as they are, show this. How is the consent to be indicated? Under the Great Seal

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—not as before, *under the Privy Seal; but under the Great Seal, and declared in Council; and in order to preserve the memory thereof, the consent thus signified is to be set out in the licence and register of marriage. What licence and register? No such things

exist abroad, and all these provisions are, therefore, inapplicable to the cases of foreign marriages. It may be said that these matters are merely directory and not essential; but they are important as showing what was the object of the Legislature, and how it was to be accomplished; and they show an object which could only be accomplished within the realm of England. It therefore follows that the provisions of the Act are only applicable to cases within the realm of England. From first to last the enacting provisions of the first clause are confined to English marriages; yet it cannot be said that that clause overlooks foreign marriages, for it deals with them by expressly excepting them from its provisions. In every respect, therefore, by the ordinary rules of construction applicable to statutes, it may be contended that the Legislature did not intend that the Act should have any operation out of England.

If these rules of construction are applied, as they ought to be, to this statute, it cannot be pretended that any man would, by being present at or assisting in celebrating such marriage abroad, subject himself to the pains and penalties of the statute. Would it be possible to frame an indictment to meet such a case? It would not. The parties could not be tried out of the British territory. The jurisdiction, like the offence, must be local; a circumstance of great importance in considering the construction of the Act.

How would this law stand with regard to Ireland? *Ireland, at the time when it was passed, was not bound by English Acts of Parliament. Suppose the marriage to be valid in Ireland, would it be valid everywhere else except here? What is the great principle of all laws on the subject of marriage? it is that a marriage good at the place where it is contracted, shall be good everywhere. The principle of this rule is so excellent in itself, and is so universally admitted, that it is applied in other cases besides those of marriage. A contract which, for want of being executed with certain forms in England, would be absolutely void here, will, if made elsewhere, according to the law of the place where it is made, be valid though executed without any of those forms, and be enforced here. The marriage here was good at Rome; and being so, to say that it is bad here would be a departure from a universal rule of law, and that too upon an implication only, and not on an express declared authority. The argument of analogy, derived from other statutes, is fatal to the application of this statute to cases of marriages celebrated abroad. The General Marriage Act affords in that way an argument against this Act being of any force in a foreign country.

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The General Marriage Act declares that its provisions shall not extend to marriages beyond seas. That means the English colonies, nothing more.

(LORD BROUGHAM : It does not even include Scotland.)

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Again, the 15 Geo. II. c. 30 (1), declares that if any person is lunatic, that person shall not marry until the Lord Chancellor has declared that such person has recovered his sanity. Does that Act operate on British subjects out of England ? It does not, and yet it is an instance of an Act of general legislation for most wise and beneficial purposes, and is wholly unrestricted by its terms. The words "not capable" will, perhaps, *be said to be of greater force than the phrase "shall not marry." The argument is deserving of little consideration except in cases where the general intention is clear, but where a particular expression might introduce a doubt into the matter. Again, what has been the course with Acts of Parliament relating to other matters done abroad ? They have been held of no effect unless the Acts expressly included cases occurring abroad. The 11 Geo. IV. & 1 Will. IV. c. 65, s. 34 (1), declares that if any person found lunatic abroad has funds in this country, such funds shall be transferred to any foreign committee : and in order to make that declaration effective, the Legislature passed another section, the 36th, which provided, that the powers given to the Lord Chancellor should be capable of being exercised as to all land and stock within any of the dominions, plantations, and colonies belonging to his Majesty. By the statute 5 Geo. IV. c. 113, relating to the slave trade, where the most strict terms of prohibition were employed against the doing of certain acts, the question arose, whether acts of the kind prohibited, done out of the limits of British territory, could be made the subject of punishment upon the individual who had done them ; and punishment in such a case being found impossible, the Legislature was compelled to pass a statute (the 6 & 7 Vict. c. 98), declaring that the acts forbidden to be done should, if done by any British subjects, wheresoever residing, be punishable under the former statute. That statute is a distinct legislative declaration in favour of the argument now submitted to the consideration of the House.

(The learned counsel then proceeded to argue that the marriage in this case was valid in Rome, and therefore must (independently of the Royal Marriage Act) be treated as valid in this country ; and

cited *Lord Cloncurry's* *case (1), *Pointer on Marriage* (2), *Story's Conflict of Laws* (3), *Warrender v. Warrender* (4), *Lindo v. Belisario* (5), *Rudling v. Smith* (6), *Lantour v. Teesdale* (7). These arguments are not reported, as the question put to the Judges assumed a marriage in fact, and also assumed the validity of that marriage so far as the Royal Marriage Act was not concerned, and made the claimant's title depend entirely on the construction to be put upon that Act.)

In the course of the evidence of the marriage, a Prayer Book, produced from the papers and documents of Lady Augusta, and containing an entry proved to be in her handwriting, was tendered in evidence. The entry was as follows: "The Prayer Book by which I was married at Rome to Prince Augustus Frederick, on the 4th day of April, 1793, by the Rev. Mr. —." The entry itself was without date.

Mr. Waddington, who was with the *Attorney-General* and *Solicitor-General* on behalf of the Crown, objected that the entry in this Prayer Book was not admissible for the purpose of proving the fact to which it related.

THE LORD CHANCELLOR:

It is admissible as a declaration by one of the parties that there was a marriage, though not admissible to prove the marriage.

The Prayer Book was received, and the entry read.

A will, dated Berlin, 15th September, 1799, and proved to be in the handwriting of the Prince, and sealed with the Royal arms, was tendered in evidence, *as a declaration made by him at the time: it was not the will under which his executors acted.

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Mr. Waddington :

This paper cannot be received in evidence, even as a declaration by the party; for it appears by the date to have been made after a suit was instituted to annul the Prince's marriage. It contains a statement of that suit, and therefore, by the decision in the *Banbury Peerage* case (8), it is inadmissible.

Sir T. Wilde :

There never was any *lis* as to the fact of the marriage; and this

(1) *Cruise on Dignities*, 276.

(2) P. 290.

(3) C. v., s. 118.

(4) 37 R. R. at p. 221 (2 Cl. & Fin.

p. 531).

(5) 1 Hagg. Cons. Rep. 216.

(6) 2 Hagg. Cons. Rep. 371.

(7) 17 R. R. 518 (8 Taunt. 830).

(8) 24 R. R. 159 (1 Sim. & St. 153).

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declaration, which only states that fact, is therefore evidence. The *lis* only related to the legality of the marriage.

Mr. Waddington :

The paper says, "Notwithstanding a decree has passed Doctors' Commons to declare my marriage unlawful and void, yet I still feel myself bound;" and then goes on to state that the writer makes the declaration contained in it for the purpose of establishing the legitimacy of his son, which had been called in question by these proceedings. This clearly falls within the ordinary rule of law against admitting declarations *post litem motam*.

Sir T. Wilde :

This paper is offered in proof only as a declaration of the fact of the marriage. That fact never has been questioned; the passage now read from the paper proves that. The decree never could have been passed to declare a marriage unlawful and void, if no marriage had in fact taken place. The dispute there was on the legal consequences of the marriage, which is quite a collateral matter.

LORD BROUGHAM :

[*101] Suppose, in a jactitation suit, the question to be, marriage or no marriage; could not those parties, one or both of them, set up this *very marriage at Rome to prove the affirmative of that question? If so, would not this suit, taking it to relate to the marriage at Rome, constitute a *lis mota*.

THE LORD CHANCELLOR :

Does that suit relate to anything but the marriage in England? Do you mean to produce the decree thus referred to?

Sir T. Wilde :

I do not.

THE LORD CHANCELLOR :

Then, for anything that appears to the contrary, it may relate to the marriage at Rome.

Sir T. Wilde :

Even if it does so, it cannot relate to the marriage in fact, but to the question whether that marriage was operative in law.

Mr. Waddington :

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The suit in which this decree was made, was a suit for nullity of marriage, instituted at the instance of the King.

LORD CAMPBELL :

That shows that there was a suit in which a marriage was in question. The natural inference is that this very marriage was the marriage in controversy. Then this declaration is one made after a sentence of the Ecclesiastical Court, and the sentence may have proceeded on the ground that there was no marriage at Rome.

LORD BROUGHAM :

The document shows that there has been a *lis* ; and my opinion is, that that makes it impossible for us to receive this document till we see what that *lis* really was. The argument that the decree only related to the lawfulness of the marriage, and not to the fact of a marriage, cannot be sustained, for the alleged marriage might have been only a pretended marriage.

THE LORD CHANCELLOR :

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The form of the judgment is, “the marriage or pretended marriage.” At the present moment this document cannot be admitted as evidence without further explanation.

LORD CAMPBELL :

It would be contrary to express decisions to admit this document. We know that there was a decree respecting the validity of a marriage : this is a declaration after that decree. *Esto*, that this particular marriage was not in controversy. Our receiving this declaration after such a decree, would only be giving an opportunity, one marriage having failed, to set up another. All the facts now relied on might have been in evidence in that suit.

LORD DENMAN :

I have got the report of the case in 2 Addams. The libel states that on the 4th of April, “A marriage, or rather a show or effigy of marriage, between his said Royal Highness Prince Augustus Frederick and the said Lady Augusta Murray, was in fact had and solemnised, or pretended to have been had and solemnised, at the house of the said Right Honourable Charlotte, Countess of Dunmore, at the said city of Rome, on the 4th day of April, 1793.”

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THE LORD CHANCELLOR :

A declaration of a marriage is only admissible in evidence as a declaration of a legal marriage. The legality of it had been in controversy here. The declaration of a marriage in fact is nothing.

LORD BROUGHAM :

[*103] The judgment is to this effect: "In respect to the fact of marriage, or rather show or effigy of a marriage, pleaded in the said libel to have been had and solemnised, or pretended to have been had and solemnised, at the house of the Right Honourable Charlotte, Countess of Dunmore, in the *city of Rome, on the 4th day of April, 1798, there is not sufficient proof by witnesses that any such fact of marriage, or rather show or effigy of a marriage, was in any manner had or solemnised at the said city of Rome, between his said Royal Highness Prince Augustus Frederick and the Right Honourable Lady Augusta Murray, spinster, the parties cited in this cause; but that if any such marriage, or rather show or effigy of a marriage, was in fact had or solemnised at the said city of Rome between the said parties, the said pretended marriage was and is absolutely null and void to all intents and purposes in law whatsoever."

This judgment distinctly declares, that there is not sufficient to prove the fact of the marriage, but that if it existed in fact, it was null and void. This surely shows that the Roman marriage was in issue.

LORD CAMPBELL :

So that the declaration in the will would be in contradiction to the judgment of a Court. It cannot be received.

Another will of a subsequent date was also tendered, but it was objected to on the same ground, and both the wills were rejected.

Dr. Lushington was afterwards called to state in what manner his Royal Highness had uniformly spoken of the claimant in conversation; but this evidence was rejected on the same ground.

The declarations of Mr. Gunn, made to his son, with respect to the marriage, were proposed to be proved in evidence by his son, on the ground that they were the declarations of an individual who knew the facts, who was not interested in misrepresenting them, who had an interest in being silent respecting them, and whose statements, he being dead, were therefore admissible in evidence.

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Sir T. Wilde and *Mr. Erle*, in support of the evidence tendered :

Mr. Gunn has been proved to have been at Rome at the period

in question. By the letters of the Prince and of Lady Augusta it is proved that they proposed to be married and were married by a Mr. Gunn, who is shown to be the person whose declarations are now tendered to the Committee. He had a perfect knowledge of the facts, and was not interested in misrepresenting them, but the contrary. The question to which these declarations relate rests partly on an Act of Parliament, which contains a penal clause. There have been proceedings in Chancery; Mr. Gunn was called as a witness, and interrogatories were put to him; he demurred to them on the ground that if he answered them he might subject himself to penalties under the 12 Geo. III. c. 11. This shows that he not only was not interested in misrepresenting facts to support the marriage, but believed himself to have an interest the other way. [The learned counsel cited *Higham v. Ridgway* (1), *Warren v. Greenville* (2), *Gleadow v. Atkin* (3), and other cases.] In *Higham v. Ridgway* the parties had the benefit of contending not that the entry which was sought to be read was against the interest of the party making it, but that what he then wrote became admissible by the subsequent entry, which was in opposition to his own interest. It may now be considered to be the rule that the fact of the entry being against the party's interest, will make it admissible. In the present case it is surmised that Mr. Gunn committed an unlawful act in celebrating the marriage in question. *It would, therefore, have been against his interest to admit that he had been a party to an illegal transaction, and in consequence of that belief he refused to give his evidence in Chancery.

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(THE LORD CHANCELLOR: But in the *Berkeley Peerage* case (4) it was decided that the mere fact of a party not having an interest, did not make a paper written by him evidence.)

Here it is stronger; it is against his interest.

LORD CAMPBELL:

Your present argument is opposed to your argument on the Marriage Act; for in that you contended that Mr. Gunn had nothing to fear, as what he did was not forbidden by law.

Sir T. Wilde:

But if he believed that he had offended against the law, that belief was sufficient; his belief need not be well founded. The

(1) 10 B. B. 235 (10 East, 109).
(2) 2 Str. 1129.

(3) 38 B. B. 635 (1 Cr. & M. 410).
(4) 14 B. B. 782 (4 Camp. 401).

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circumstances of the *Berkeley* case are materially different from those of the present. This is the case of a person making a declaration when he believed it was his interest to suppress, not to make, that declaration. The necessity of the case would justify the admission of this evidence, and the interest which the law considers is not confined to pecuniary interest. If it is established that in the mind of the deceased party this declaration was contrary to his interest, and if it is further shown that he had the means of knowledge, and had no motive to misrepresent what he knew, his declaration is admissible in evidence. A verbal statement of a party, made contrary to his own interest, is always receivable in evidence. A person in occupation of an estate is assumed *primâ facie* to be the owner in fee-simple, but the admission of such a person that he holds a less estate, though made by parol, may be received to cut down his interest. It may be so received because it is against his interest to make *the admission. The principle of law is clear, and it becomes more distinctly applicable when a question of fact, ascertainable a few years since by other evidence, has become difficult of proof by the deaths of parties who might otherwise have been called as witnesses. A dying declaration is admissible because the person who makes it believes himself to be in *extremis*, and is supposed to have no motive to misrepresent, but every inducement to tell the truth.

LORD DENMAN :

There must be a real danger of death at the time when the declaration is made.

Mr. Erle :

A man is protected from answering when he believes that his answers may subject him to a prosecution.

(LORD BROUGHAM : It does not follow, when a man is protected from answering because he believes himself to be in danger, that therefore his declarations on the matter respecting which he has been protected from answering in his lifetime, should after his death become admissible in evidence.)

But the existence of this protection furnishes the argument of analogy, that the fear of danger is a matter recognised by the law as affecting the testimony of a witness. The fact that he fears a prosecution will of itself protect him from being forced to answer; and his

declarations made when that fear might be supposed to induce him to suppress them, are for the same reason admissible in evidence.

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THE LORD CHANCELLOR :

This question has been put upon two grounds. It is contended in the first place, that as Mr. Gunn might have stood indifferent on this occasion, as he had no interest and as he knew the facts, he being dead, his declarations are receivable in evidence. That is a position which cannot be maintained in this House ; for in the *Berkeley Peerage* *case (1) that point was expressly decided the other way, on reference to the Judges. The clergyman there was dead ; his declarations were offered in evidence, as he had performed what was stated to be the marriage ; he was indifferent in point of interest. The question of the admissibility of his evidence was put to the Judges, and they were unanimously of opinion that it could not be received. So far as this House is concerned, we cannot again open that question, but must consider that decision of it as final.

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The next ground of argument is, that in all the *cases where the party has known the facts and is dead, and has made declarations, and these declarations are against his interest, and would if he had been living subject him to a prosecution, such declarations are receivable in evidence. That is the broad and general proposition. That proposition cannot be sustained : let us try it by instances ordinarily occurring. A. is indicted for murder ; B. who is dead, made while living a declaration that he was present at the murder : that declaration is against his own interest, and would, had he lived, have subjected him to a prosecution. It is in principle the very case supposed in the argument, and it is not possible to say that such declaration would have been receivable in evidence. Again, suppose the Duke of Sussex had been put upon his trial under the Royal Marriage Act, for contracting this marriage, is it possible to maintain that Mr. Gunn's declarations would have been receivable in evidence against him ? It is sufficient to state these instances, to show that the proposition of the learned counsel cannot be maintained. It is not true that the declarations of deceased persons are in all circumstances receivable in evidence, when in some way or other they might injuriously affect the interest of the party making them. Nor is it true, that because, while living, a party would be excused from answering as to certain facts, his declarations as to those facts become evidence after his

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death. These are not correlative nor corresponding purposes. Besides, the case is not here, what for the purposes of this argument it is represented to be. First, Mr. Gunn is said not to have been liable to prosecution. Then these declarations were made to his own son; and in so making them, it cannot be presumed that he would have exposed himself to prosecution, or that he made them under any *belief that he should do so. These two circumstances take away the main grounds on which the argument for the admission of these declarations has been rested. On no ground, therefore, can these declarations be, in my opinion, received in evidence.

LORD BROUGHAM:

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I so entirely agree with my noble and learned friend, that I need scarcely trouble your Lordships further than to express my concurrence in what has been expressed in so luminous and convincing a manner. The case of *Higham v. Ridgway* declares the law on the point at issue. The more we look at that case, the more clearly must we come to two conclusions. In the first place we must see that the evidence there was admitted, not because the subject-matter of the declaration was within the peculiar knowledge of the party making the declaration, but that it was a declaration made against an interest of a very specific nature, viz. a pecuniary interest. I may further say, that one of the learned Judges who is now present to assist your Lordships, I mean Mr. Justice WILLIAMS, was a counsel in that very case, and argued it with Mr. Serjeant Manley in 1808, against the admission of the evidence; and he remembers perfectly well that the evidence was received on the express and specific ground that it was an entry against the pecuniary interest of the party. Another conclusion to which we must come is that, considering the nature and tendencies of such evidence unless properly restricted, we ought to be careful and cautious of extending the rule as laid down in the case of *Higham v. Ridgway*, beyond the limits settled by that case. To say, if a man should confess a felony for which he would be liable to prosecution, that therefore, the instant the grave closes over him, *all that was said by him is to be taken as evidence in every action and prosecution against another person, is one of the most monstrous and untenable propositions that can be advanced. Lord KENYON never could have entertained the opinion or held the doctrine imputed to him in the case of *Standen v. Standen* (1). The law in

Higham v. Ridgway (1) has been carried far enough, although not too far. The rule, as understood now, is that the only declarations of deceased persons receivable in evidence, are those made against the proprietary or pecuniary interests of the party making them, when the subject-matter of such declarations is within the peculiar knowledge of the party so making them.

LORD DENMAN :

I entirely agree with what has fallen from my noble and learned friends. I take the rule in *Higham v. Ridgway* to be as my noble and learned friend has just stated it. With regard to declarations made by persons *in extremis*, supposing all necessary matters concurred, such as actual danger, death following it, and a full apprehension, at the time, of the danger and of death, such declarations can be received in evidence; but all these things must concur to render such declarations admissible. Such evidence, however, ought to be received with caution, because it is subject to no cross-examination. As to the case of *Standen v. Standen*, I agree with my noble and learned friend, that it is doubtful whether Lord KENYON ever could have admitted the evidence in the way there described; but even if he did, it must be recollected that that was an issue from the Court of Chancery, in the trial of which the rules of evidence are sometimes relaxed, as the whole proceeding *is one simply for the information of that Court. The witness there came to bastardise his own issue; he was discredited, and the verdict was against him. It never, therefore, became necessary to discuss the propriety of what had been done: but that case has never since been acted on, and to me it seems to involve a very dangerous principle of law.

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LORD COTTENHAM :

I beg simply to express my concurrence in what has already been said by the noble and learned Lords who have preceded me.

LORD CAMPBELL :

By the law of England the declarations of deceased persons are not generally admissible, unless they are against the pecuniary interest of the party making them. There are two exceptions: first, where a declaration by word of mouth or by writing is made in the course of the business of the individual making it, there it may be received in evidence, though it is not against his interest: *Doe d. Patteshall v. Turford* (2). The service of a notice may thus

(1) 10 R. R. 235 (10 East, 109).

(2) 37 R. R. 581 (3 B. & Ad. 890).

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be proved ; and, in like manner, an entry by a notary's clerk that he had presented a bill, for that is in the ordinary discharge of his duty. But as to the point of interest, I have always understood the rule to be, that the declaration, to be admissible, must have been one which was contrary to the interests of the party making it, in a pecuniary point of view ; and, with the exception of *Standen v. Standen*, I do not know any case which appears to break in upon that principle. I think it would lead to most inconvenient consequences, both to individuals and to the public, if we were to say that the apprehension of a criminal prosecution was *an interest which ought to let in such declarations in evidence. But even if such a rule did exist, it would not permit the learned counsel here to bring in the statements of Mr. Gunn, for how are your Lordships to know what state Mr. Gunn's mind was in when he made the declarations ? At that time of his conversation with his son, he might have entertained a very different belief from that which he laboured under when he demurred to the bill in Chancery, and refused to answer the interrogatories put to him there. He might have believed that the marriage having been celebrated abroad, the provisions of the Royal Marriage Act did not extend to it, and that he was in no danger whatever from what he had done.

LORD LANGDALE :

My Lords, lest it should be supposed that there is any difference of opinion on this point, I beg to say that I fully concur with the noble and learned Lords who have preceded me.

The declarations tendered were rejected.

The Right Rev. Nicholas Wiseman, D.D., having been called, and having begun to give his evidence on the law at Rome on the subject of marriage, referred, while doing so, to a work which was lying by him. This was noticed.

LORD BROUGHAM (to the counsel) :

You had better state to the witness that he may refresh his recollection by referring to authorities on the matter of law to which his evidence is addressed.

THE LORD CHANCELLOR :

Do so. The witness may thus correct and confirm his recollection of the law, though he is the person to tell us what it is.

LORD CAMPBELL :

The most authoritative form of *getting at foreign law, is to have the book which lays down the law. Thus we have had the Code Napoleon in our Courts. It is better than to examine a witness, whose memory may be defective, and who may have a bias influencing his mind upon the law.

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LORD BROUGHAM :

My opinion entirely concurs with that of the LORD CHANCELLOR. The witness may refer to the sources of his knowledge; but it is perfectly clear that the proper mode of proving a foreign law is not by showing to the House the book of the law; for the House has not organs to know and to deal with the text of that law, and therefore requires the assistance of a lawyer who knows how to interpret it. If the Code Napoleon was before a French Court, that Court would know how to deal with and construe its provisions; but in England we have no such knowledge, and the English Judges must therefore have the assistance of foreign lawyers. This was fully considered in *Dalrymple v. Dalrymple* (1), in which the opinion of the Scotch lawyers was taken as a matter of fact, they being examined upon oath. In those opinions they referred to Scotch statutes and Scotch law-books. It was agreed on all hands, that that which was there in evidence were not the mere statements of foreign text-writers, but the opinions of skilful and scientific men who were examined on oath.

LORD DENMAN :

There does not appear to be, in fact, any real difference of opinion upon this point. There is no question raised here as to any exclusive mode of getting at this evidence, for we have both the materials of knowledge offered to us. We have *the witness, and he states the law, which he says is correctly laid down in these books. The books are produced, but the witness describes them as authoritative, and explains them by his knowledge of the actual practice of the law. A skilful and scientific man must state what the law is, but may refer to books and statutes to assist him in doing so. That was decided, after full argument, on Friday last, in the Court of Queen's Bench (2). There was a difference of opinion, but the majority of the Judges clearly held, on an examination of all the cases and

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(1) See 17 R. R. 521 (2 Hagg. Cons. Rep. 54).

(2) *Baron de Bode's* case, tried at

Bar in the Court of Queen's Bench, 20 June, 1844 [8 Q. B. 208].

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after full discussion, that proof of the law itself, in a case of foreign law, could not be taken from the book of the law, but from the witness who described the law. If the witness says, "I know the law, and this book truly states the law," then you have the authority of the witness and of the book. You may have to open the question on the knowledge or means of knowledge of the witness, and other witnesses may give a different interpretation to the same matter, in which case you must decide as well as you can on the conflicting testimony: but you must take the evidence from the witnesses.

LORD CAMPBELL :

I entirely concur with the law as laid down by the noble and learned Lord who has just spoken. The foreign law is a matter of fact to be proved by evidence. You call witnesses to prove that fact; you ask the witness what the law is. He may from his recollection, or on producing and referring to books, say what it is, or that it is found correctly stated in such a book. He may here produce the book, and say that that is according to the law of

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*Rome. So likewise he may take the book to refresh his memory.

LORD LANGDALE :

The question here is, how a witness as to what is foreign law, is to be examined; in what form and manner he is to give his testimony. Foreign law is, in the Courts of this country, a matter of fact. A witness more or less skilled in it, is called in to depose to it. He may state what it is from his own knowledge, or assist his own knowledge by reference to books and authorities that are within his reach: he may refer to text-books, or to books of decisions, and so render his knowledge more accurate than before.

The witness went on to state what was the law of Rome, and what the practice of the Roman Courts, on the subjects of marriage generally, and of marriages between Protestants in particular (1).

The Right Rev. Nicholas Wiseman, D.D., was then recalled, and the following examination took place :

I am a Roman Catholic Bishop.

I am coadjutor to the Bishop, who is Vicar Apostolic of the central district of England at present.

I preside over the Roman Catholic College at Oscot.

(1) This part of the evidence is not reported, as the question put to the Judges rendered the consideration of it unnecessary. [It was subsequently reported at the end of 11 CL & Fin.]

I resided at Rome from 1818 till 1840.

I was the Superior of the English College for several years during that period. THE
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In the event of any questions arising in England relating to the validity of Catholic marriages, the Vicars Apostolic in England have the same jurisdiction in respect of such cases which any Bishop would have upon the Continent.

I have had as fair an opportunity as might be expected to become acquainted with the practice and doctrine upon the subject; but if the office to which the question refers is my present office, I should say that it would be an important part of my duty at present, to make myself acquainted with the law upon the subject. [118]

In my office as coadjutor [*sic*].

I have held that office in England four years.

I came to this country immediately from the office of Superior of the English College at Rome.

I am aware of the law that prevails at Rome, usually described as the Council of Trent.

The law at Rome by which the marriages of Roman Catholics are regulated, is the law of the Council of Trent, which declares that a marriage, to be valid, must be in the presence of the parish priest and two witnesses.

There has been no regulation upon the subject of the marriages of Protestants, and I could not refer to any decree which went to define anything relating to the marriages of Protestants in Rome.

There are authorised publications of the Council of Trent, which are acted upon as authorities by the judicial tribunals at Rome.

The canons of that Council of course are perfectly known, in the same way that any other judicial decisions or any public enactments are known. The canon was published, and its decrees communicated officially to the whole Church; and any edition of it that might be considered as coming from an authorised press, as from the one in Rome, would certainly be admitted as sufficient evidence.

In answer to questions by the *Attorney-General*, the witness said: I have been a member of one of the *ecclesiastical tribunals, but not one into which such cases as this would come. I have had no personal experience of the administration of the law at Rome. [*119]

The *Attorney-General* submitted that sufficient foundation had not been laid for receiving this evidence, by proving that the witness

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was qualified, from his office or means of knowledge, to give evidence upon this subject.

The Committee desired that he might be further examined on this subject.

The witness then underwent the following examination :

I have studied the canon law.

I have not gone through a regular course of canon law ; but for the discharge of my duties it has been of course necessary that I should make myself acquainted with the canon law upon all those points upon which it is applicable to cases that may arise ; and among others, of course, to matrimonial cases, so as to form my own opinion upon the subject.

All that relates to matrimonial cases would come, of course, before me in my present office. A case might arise in which two Protestants, having been married abroad, came into this country, and became Catholics ; and it would be my duty to decide whether they should be separated or re-married, or whether I should hold their marriage valid.

In disposing of those cases which come as it were officially before me here as coadjutor to the Bishop for the central division of England, I should govern myself by the canon law, as far as it is applicable to cases of that kind. I should do so by the canon law of Rome.

[*120] To enable me to perform the duties of the office I hold, I have studied the canon law respecting marriage *which prevails now at Rome, and govern myself by that law in my decisions.

The Attorney-General.:

Surely the decree of the Council of Trent is no part of the law you ever administer here, is it ?

That decree is not.

That decree is a portion of the law of Rome, is it not ?

Certainly.

And therefore the canon law you administer here is not the same law of marriage as is administered at Rome ?

It is the same law ; because that very decree would come under my notice, as in the case I have stated, where I should be obliged to decide upon the law of Rome or other Catholic countries, in case persons married, in those countries, Protestants who came into my

jurisdiction. It would be my duty to decide with respect to them, and the law which would decide their case would be, of course, the law as administered in other countries.

Suppose a question as to the validity of a marriage between Roman Catholics in Ireland, where that decree of the Council of Trent has been received, should come before me, I should be guided by the decree of the Council of Trent in deciding upon the validity of that marriage.

No instances have ever come before me of a marriage of two Protestants at Rome, nor of the marriage of two Protestants in any Catholic country where the decree of the Council of Trent was received as law.

I do not know any actual instance in which a marriage of Protestants has come before me, where that marriage has been solemnised according to the Protestant form in a Catholic country in which the Council of Trent has been received.

I do not know any decision with respect to Protestant marriages by the tribunals at Rome.

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All the higher tribunals there are in the hands of ecclesiastics, entirely.

I have not directed my attention expressly to prepare myself for those higher offices.

I could not say that I have gone through a legal education.

I have gone through the studies usual for ecclesiastics, but not usual for ecclesiastical lawyers.

I should not say that I have gone through such a course of study as would qualify me to be a Judge in the ecclesiastical tribunals; because it is necessary to take a degree of doctor of laws, and to go through a full course of civil ecclesiastical law for the purpose, and I have not done that.

There is a tribunal called the Penitentiary, at Rome.

It consists of a board of Cardinals, with their officers, whose duty it is to examine into cases connected with crimes and guilt of different sorts.

A matrimonial question might come before me in my official capacity as coadjutor of the Bishop in this form: I might have to decide whether, for example, the marriage was valid or not; for instance, if there had been a canonical or an ecclesiastical impediment, which made the marriage void *ab initio*, it would be my duty to decide upon it.

I should decide for the purpose of separation or re-marrying. I should decide in such a case *pro salute animæ*.

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Merely with a spiritual view.

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The validity or invalidity of a marriage would not come before me in my spiritual capacity with a view to censure or penances which I might impose upon *the parties alone, for there might be no penance and no censure; but simply to set it right with respect to the spiritual consequences.

The validity of a Protestant marriage could never come before me except with a view of the parties becoming Catholics afterwards.

The question of marriage is an ecclesiastical question decided by the ecclesiastical law at Rome.

My duties led me into communication with the ecclesiastical authorities of Rome. My decision upon the question of marriage or no marriage, which is an ecclesiastical question, would be of authority at Rome if it was unappealed from.

If I decided a case here in England upon a question of marriage, that decision would have weight in a Roman tribunal.

I do not presume that I have means of knowing the law upon this subject more than any other learned Roman Catholic ecclesiastic. For example: as to this question I have considered it myself; I have looked into the authorities, and I have conferred with many persons concerning it, and I have formed my judgment from those various sources, as I should upon any other point upon which I should be called upon to exercise a practical judgment.

It has been part of my duty and my object to acquaint myself with the state of the ecclesiastical law at Rome upon the subject of marriage.

I have studied for that purpose.

I have been appointed an ecclesiastical Judge in this country by the Court of Rome, in matters relating to ecclesiastical jurisdiction. I have been appointed as any other Bishop or Vicar-General might be, and no further.

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There is not any ecclesiastical authority in this *country to decide upon the subject of marriages, except the Catholic Bishops.

The persons holding that office are generally the authorities which have jurisdiction throughout Catholic countries to decide upon questions of marriage.

That is, matrimonial cases, as far as the canon law and ecclesiastical law affect them, belong to the jurisdiction of the Bishops.

I am one of those Bishops.

I never gave lectures upon ecclesiastical law at Rome.

I have filled the office of Bishop in this country for four years.

The canon law at Rome governs both temporal and ecclesiastical law.

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I have had no practical experience, either as an advocate or as a Judge, in any Court at Rome.

Sir T. Wilde and *Mr. Erle*, in support of the witness's admissibility :

This witness stands in the situation of a person who ought to be received to give evidence on this subject. It never has been laid down that the only individuals competent to give evidence upon foreign law are those who are professionally qualified to practise. Even persons engaged in trade have been received to prove foreign law. On this question of marriage, the highest authority is not, in Rome, vested in professed lawyers. The witness here has studied at Rome as an ecclesiastic ; he became head of the university there. He is now a Roman Catholic Bishop in this country, charged with the duty of deciding on questions of marriage, whether they are regular or not, or are *ab initio* void ; and his decisions on this matter would be received as authoritative at Rome. Legal advocates are never promoted to the office of *Bishop ; but the authorities at Rome say that the Bishop is the person to decide on the question of marriage. The person promoted to that office is, by the laws of Rome, considered best fitted to decide on that question according to those laws. The evidence of a man who has studied abroad has been taken on such a subject. In *Lord Cloncurry's* case a single priest was examined. If a barrister or advocate can alone be examined on this matter, then a man who had been for 25 years Attorney-General in some of our colonies (where that office is not necessarily filled by a barrister), could not be heard to give evidence as to the laws of the colony where he had so long held office.

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(LORD BROUGHAM : Yes, the possession of that office would give him the right. He would be *peritus virtute officii*.)

The cases of *Lacon v. Higgins* (1), and *Ganer v. Lady Lanesborough* (2), are decisive on this point. In the latter the question was as to the validity of a foreign divorce, and a Jewess was there permitted to give parol evidence of her own divorce in Leghorn, according to the custom of the Jews there.

(1) 25 R. R. 779 (3 Stark. 178; Dowl. & Ry. N. P. C. 38).

(2) 3 R. R. 647 (1 Peake's N. P. C. 25).

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(LORD BROUGHAM : Your proposition goes to this extent; that any foreigner can be called to prove the law of a foreign country.

THE LORD CHANCELLOR : In *Ganer v. Lady Lanesborough* the woman was called to prove the custom, not the law.)

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In the case of *Reg. v. Dent* (1), where proof of the Scotch law was required, a witness was tendered, and it was objected that he was not of the legal profession; it was answered that it was not necessary that he should be of any particular profession, but that if he satisfied the Judge that he possessed in fact sufficient knowledge, he was *admissible as a witness; and Mr. Justice WIGHTMAN adopted that argument, and admitted the witness. It cannot be objected here that the judgment of this witness in his office can only affect the party *pro salute anime*; for such an objection would exclude from our Courts the testimony of Dr. Lushington as to what was the law in the Court where he presided. Here the witness exercises a judicial office, the decisions of which would be received and acted on by the highest tribunals in Rome.

THE LORD CHANCELLOR :

There are two questions here. First, whether, independently of the jurisdiction exercised by Dr. Wiseman, his evidence would be admissible. If not, then, secondly, whether that jurisdiction, whether his office here, will render that evidence admissible. So you had better examine him with respect to the nature and duties of his office.

The witness's examination then proceeded as follows :

The authorities in this country from the See of Rome, that have power to decide upon questions arising between Catholics respecting marriage, are the Vicars Apostolic of England.

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Their authority is limited with respect to the power of dispensing in certain cases, in which they are obliged to have recourse to the supreme authority at Rome; with the exception of those cases, the powers are the same as would be exercised in Rome itself. I ought to observe that I stated myself to be the coadjutor to the Vicar Apostolic. It might be necessary to explain in what relation I am: I am appointed by the Holy See, with the character of Bishop, to assist the Bishop in the administration of his diocese, receiving participation in all his faculties and powers from him; *that participation being sanctioned, of course, to the full extent to which he gives it, by the Holy See. With respect, therefore, to matri-

monial cases, I am in possession of the same administrative faculties which he exercises.

I have during my residence in this country frequently exercised that jurisdiction.

I am guided by the ecclesiastical law of the Church as applicable to this country ; for instance, as to the case of clandestinity, or any matter involved in that decree of the Council of Trent, I should have to administer for England as for a country in which that decree is not promulgated ; but if cases came before me from other countries in which it is promulgated, I should have to decide according to the practical judgment I should form of the force of that canon in those countries.

Supposing a question relating to a marriage contracted in a Catholic country abroad should arise between two Catholics in this country, it would become my duty and part of my jurisdiction to decide the question, whatever it might be, relating to that marriage.

There are not any questions which could come under judicial decision at Rome, relating to a marriage between two Catholics in a Catholic country, which are not within my jurisdiction, supposing the same questions to arise between two persons in this country who had so married abroad.

The decision of any case of marriage could be fully made in this country. Cases of complication and difficulty might arise which I might think it expedient to send to Rome for solution, in order to have the benefit of the opinion of others, but it would not be from limited jurisdiction.

I might, as other Bishops, take advice from Rome, but the matter would be within my jurisdiction. [127]

I have authority to determine whether a marriage between two Roman Catholics is or is not a valid marriage.

I have also authority to determine whether it is a regular or an irregular marriage.

And to subject the parties to penance, if it is irregular.

If two Roman Catholics go through a ceremony of marriage which is not a marriage, I declare it to be void.

I apply to that such of the ecclesiastical laws of Rome as are in force in this country.

I apply that to marriages contracted in other countries.

The law I should apply as relating to a marriage contracted at Rome, would be the law as I consider it held at Rome.

If the marriage was contracted here, I should apply so much of the

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law of Rome as is applicable here ; and if the marriage was contracted at Rome, I should apply to it the law of Rome as relating to marriage.

I decide with respect to the validity of marriages ; whether a marriage is a good marriage or whether it is void, whether it is a regular or irregular marriage ; and I have all the jurisdiction that the Ecclesiastical Courts have in Rome.

My functions and jurisdiction are confined purely to spiritual purposes.

[*128] When I sit for the purpose of deciding these matters, I am under no obligation ; I have no Court. I, of course, make it a rule of conscience to take the best advice that I can, especially in cases, which constantly occur, of the validity of marriages, which are coming *before me certainly oftener than every month. I always take the advice of such theologians and persons as I can consult. The case is accurately studied ; and in those books which have been referred to, the authorities are collected, and I form my judgment according to them. Often the case is so simple as to require no consideration.

The cases are not argued before me.

We have no professional lawyers, ecclesiastical advocates, in England, whom I can consult.

I frequently send cases over to Rome.

I should consult persons, for example, who would be employed in the tribunals, or who had been employed in them, and who knew the practice of the law, and get their decisions ; but some cases I should refer at once to the tribunals themselves, when they were very complicated.

The tribunals at Rome would respect my decisions, and act upon them.

It is the practice for Bishops holding the office I do, and deciding questions such as I refer to, occasionally to refer to Rome for advice upon particular cases.

The law books at Rome show that that has been the course for centuries.

There are volumes of decisions made upon the demands of the Bishops for explanations.

It is the course for such cases to be submitted to and decided by the authorities at Rome, without being argued before them.

They are sent from the Bishop direct, and they decide upon his representation.

I have the power of deciding whether a marriage is valid or invalid ; suppose I decide it to be invalid, the parties would be

obliged to separate, unless I *granted a dispensation, or, if it was not within my faculty, procured it for them; but until such dispensation was granted they would have to separate.

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Suppose they did not separate?

Then of course they would not be admitted to participation in the rites of the Church,—to the sacraments of the Church.

Therefore my jurisdiction is entirely confined to spiritual censures, and to consequences of an ecclesiastical kind.

I should have no power to affect the property or the civil rights of the parties in this country, except *in foro conscientiæ*.

At this moment I do not remember a case in which I have had to inquire in this country into a marriage which had taken place abroad.

It has never occurred to me to have to decide in this country any question upon the validity of a marriage which had taken place at Rome.

I have had a great many matrimonial cases that were Irish cases, but at this moment I cannot remember a specific case.

I have had to inquire whether at the time the marriage took place, the Council of Trent had been promulgated in that given diocese; and I have had to write to Ireland.

In cases of marriage contracted abroad, but in which the parties had come into my jurisdiction, then of course any question of marriage comes under my consideration.

There is a superior tribunal at Rome which could call any decision of mine to account, and could re-examine the case; but, *primâ facie*, the tribunals there would take my decision as that of the ordinary tribunal in the case.

My decision would stand till it was reversed.

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I do not contemplate a case of a marriage contracted at Rome coming under my jurisdiction in this country, and having to be decided by me; but if it did, and the case were afterwards sent to Rome, in that case they would take my decision as they would that of any other Bishop in the Church, of course, having the power of examining it. If the case had occurred in Rome, where the witnesses could be had, the case would be more likely to be gone into at Rome than another case that happened here. In fact, if the case had happened in Rome, I should hesitate about deciding upon it, because I should think that the natural place for it to be decided would be at Rome.

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But supposing the parties were here, and one of them was to appeal to my jurisdiction, I should decide as I should in any other case.

And in that case, in the estimation of the Roman tribunals, my judgment would be a standing judgment till it was reversed.

I have never had an instance of that kind brought before me.

I have not known any such thing occur as a decision given by a Bishop in this country upon the validity of a marriage at Rome, which was held to be entitled to weight at Rome.

Matrimonial cases ordinarily come before me in two ways. One is consultively, when persons come before me as a Judge, and I have to give a decision whether a given case is a case of valid marriage or not; in that case frequently they come upon petition. In other cases they come what might be called penitentially; that is, persons who have been living in a state of supposed marriage, which was null, *and who for remedy wish to be married, and to have a dispensation granted. Such a case comes before me either on the application of the parties themselves, or of their clergyman.

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They might come contentiously before me, but I have never had a case of that kind.

I do not recollect ever having had a case before me of a litigated marriage, where the parties have been contending one against the other, but I certainly have the jurisdiction to decide such cases.

I know what the process is in the English Ecclesiastical Courts, in a suit for restitution of conjugal rights.

Such a case has never occurred in my jurisdiction. It would partake more of a mixed than a purely spiritual nature.

I do not know what jactitation of marriage is in the English law.

We have never had a case where a party wishes to obtain a decree declaring that a supposed marriage is invalid; but such cases might occur.

Where it is for purely spiritual purposes, such cases would be within my jurisdiction. If they involved civil rights, I should not assume jurisdiction.

But if the parties would submit to the decision as a spiritual one, and act upon that decision, in that case civil consequences might follow.

Supposing that A. and B. came before me, and that A. said that B. pretended that they were man and wife, and A. denied that there was any such marriage between them:

I should have no power to hear evidence, to summon people

before me, or to hold a Court; and therefore I could only treat the case as between the two parties.

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Where both the parties submitted to my jurisdiction, but opposed each other contentiously, I should have a right to decide the point of law, to decide what was their duty.

A contentious suit might originate before me, in the way that was mentioned just now; that case might come before me, where one of the parties might make application, stating that he did not consider himself married to the other, and asked for a separation; and where the other party, the woman, might maintain that she was married. The case might be referred to me for judgment by the parish priest, or by the parties themselves.

But supposing there was a contentious suit, supposing one party wanted to proceed against the other, but the other was unwilling to submit, I could have no right to force either of the parties, except by spiritual means. I could tell that person, It is your duty, if you are married, of course, to abide my judgment; my decision is, that you are married.

I should, under such circumstances, decide whether they were living in wedlock or living in fornication.

Whether it was a valid marriage or not, as far as I could have the evidence before me; but I could not compel evidence in any way, undoubtedly.

Supposing I declared the marriage void, and those parties lived together afterwards at Rome, the authorities at Rome might or might not act upon my judgment, and compel those persons by ecclesiastical censures to separate.

I do not know that they would act, because they are very prudent and very cautious; and I do not know an instance in which they have acted with regard to strangers, in separating them, or entering into those questions.

With respect to English subjects they would not interfere, unless the matter came in the way of police.

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Supposing two Italian subjects were in this country, and a question arose with regard to their marriage, and I pronounced it void, my judgment would be treated at Rome, for all ecclesiastical purposes, as a judgment, until reversed.

And civil rights would be administered upon the footing of that judgment?

If they had my attestation that they had not been married in

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this country, and that I considered the marriage they had contracted to be null and void, the Roman Court would act upon that judgment till it was reversed.

Supposing two Catholics in this country, and that one of the parties chose to live separate, and the other wished to continue to live in a married state, it would be competent to the person wishing to live in a married state to apply to me, purely upon ecclesiastical grounds, to call upon the other to live according to the contract of marriage.

After I had pronounced the marriage to be valid, and called upon them to live together, the person that did not obey would be subject to ecclesiastical censure.

The Court of Rome would in such a case deal with my judgment in like manner as in other cases I have stated.

The only difficulty is, how such a case would be likely to be brought before it.

My statement is, that my judgment, upon all questions within my jurisdiction, is a judgment accredited at Rome until reversed.

The *Attorney-General* :

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The witness is clearly not *a professional lawyer. To render his evidence admissible he must have some peculiar means of knowledge, as from office, for instance. Whether he has so or not the Committee must decide.

THE LORD CHANCELLOR :

He comes within the description of a person *peritus virtute officii*. I ought to say at once, that it is the universal opinion both of the Judges and the Lords, that the case (*Reg. v. Dent* (1)) as represented to have been decided by Mr. Justice WIGHTMAN, is not law.

LORD LANGDALE :

The witness is in a situation of importance ; he is engaged in the performance of important and responsible public duties ; and connected with them, and in order to discharge them properly, he is bound to make himself acquainted with this subject of the law of marriage. That being so, his evidence is of the nature of that of a Judge. It is impossible to say that he is incompetent.

The counsel were informed, that the Committee was of opinion that the witness came within the description of a person *peritus*,

and that therefore his evidence was admissible. He was then examined, and gave evidence to the effect that the marriage contracted in this case was valid by the law of Rome. After he had concluded his evidence, some discussion ensued as to whether the claimant might call any additional witnesses on the point of the marriage law, should the Crown produce evidence to meet that which had been already adduced.

THE LORD CHANCELLOR :

The *Solicitor-General* has heard all the evidence. I do not think that the junior counsel for the claimant can be called upon to sum up the case till he knows whether this is all the evidence *that will be required on this point; and the counsel for the Crown ought now to elect what course they mean to adopt, and to say whether they will or will not call evidence. *Sir T. Wilde* ought, however, to understand that he cannot be allowed, unless as evidence in reply, to call any other evidence than what he may think fit to do before he closes his case. He wishes, if the Crown should think it right to call evidence, that he may have the opportunity to produce additional evidence. That is not a position of things which can ever be acceded to. *

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The *Solicitor-General* was not prepared to make his election at that moment.

Sir T. Wilde, after a short consultation with his learned colleagues, said that he would take upon himself to close the claimant's case upon the evidence as it now stood.

Mr. Erle then proceeded to sum up the case of the claimant :

He first of all discussed very fully the questions of the marriage in fact, and of the validity of that marriage by the law of England and the law of Rome. (As the decision turned wholly on the construction of the Royal Marriage Act, this part of his argument is omitted.) The remaining question is, as to the application of the Royal Marriage Act. The enactment in the first clause is one which annuls and renders void a marriage made contrary to the provisions of that Act. The expression, as to every descendant of Geo. II., is said to be equivalent in its effect to a clause extending to all marriages contracted within or without the realm of England. This is a statute passed to deprive certain persons of a natural right, a right sanctioned and enforced *by the law both of God and

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man, or at least to prevent those persons exercising that right, unless in a very limited and restricted manner. Can such a law, without any direct and express provisions, apply to marriages contracted in a foreign country? It is a general rule in the laws of all countries, that *leges extra territorium non obligant*. An Act of Parliament may be so worded as to operate on all Englishmen everywhere; but unless it is so worded, its operation must be confined within the realm of England. The recent Slave Trade Suppression Act, 6 & 7 Vict. c. 98, is an instance where that rule was expressly acted on. The 5 Geo. IV. c. 118, was directed to the same purpose, and many of the acts there prohibited were acts which could not be done within the realm of England; yet for want of express words extending the operation of that Act to foreign countries, it could not be applied to persons who there did the very acts which it was intended to prohibit. The Act against bigamy, 1 Jac. I. c. 11, enacted in the broadest terms, that if a man being married shall marry again, he shall be guilty of felony. Under that statute, a man who, having married here, went abroad, and during the life of his wife there married another woman, could not be punished (1). It may be true that the rule as to criminal laws not affecting a man beyond the limits of the country in which they were made, was applicable there, and affected the operation of the statute; but it did so only because of the omission of the word "wheresoever," or the words "in England or elsewhere," or other equivalent expressions; and this objection was held applicable in the same manner to the 35 Geo. III. c. 67; and, therefore, when the 9 Geo. IV. c. 31, was passed, the words "within the realm of England or elsewhere" were introduced, to get rid of the difficulty. The same rule has been *held in Ireland, where the statute 9 Will. III. c. 3, against mixed marriages, was rendered inoperative as to marriages out of Ireland, by the want of some such expressions: and another Irish Act, the 2 Anne, was passed to supply the defect, and there the words "out of the realm" were introduced. For the same reason the two Irish statutes 9 Geo. II. c. 11, and 19 Geo. II. c. 13, were held to operate in Ireland, and not beyond its territory. The English statute 15 Geo. II. c. 30, declaring that if any lunatic should marry, every such marriage should be null and void, was for the same reason inoperative out of England. And it is yet doubtful whether the 5 & 6 Will. IV. c. 54, prohibiting all marriages of persons within certain degrees of relationship, and declaring such

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(1) *Anonymous*, Sid. 171.

marriages absolutely null and void, would apply to such marriages contracted by British subjects out of the realm of England.

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THE LORD CHANCELLOR :

With respect to the statute just mentioned, I wish to observe that I am supposed to have brought in a bill to prohibit a man from marrying his former wife's sister ; I did no such thing. The statute simply says that such a marriage shall be void, not voidable. The statute was passed merely for the purpose of getting rid of the doubt which might for years leave two parties and their children in the belief that a valid marriage had taken place, subject in fact to have that marriage declared void by a suit instituted just before the death of one of the parties. As to the last Act relating to the slave trade, it was absolutely necessary to be passed ; for the former did apply in some instances, and it was necessary to draw the line to show distinctly where it was and where it was not applicable.

Mr. Erle :

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The principle contended for is, however, proved by these Acts. In the Acts against usury, 13 Eliz. c. 8, and 12 Anne, s. 2, c. 16, words of the widest signification were employed, but it was held that they applied only to contracts made in England, and did not apply to those which were made elsewhere, and the 14 Geo. III. c. 79, and 3 Geo. IV. c. 47, were passed to remedy the defect. The same observation applies to the gaming statutes, 16 Car. II. c. 7, and 9 Anne, c. 14.

THE LORD CHANCELLOR :

Suppose a divorce case, where parties are to be prohibited from marrying, what words must be used to effect that object ?

Mr. Erle :

The Act must expressly name the parties, and prohibit them from marrying anywhere. The rule of limited construction of such an Act as this, is especially applicable to cases of marriages : first, because the principle of all law is to favour marriage as the most important of all natural and civil rights ; and, next, because of the universal rule of law, that marriages valid by the law of the place where they are celebrated, are valid all over the world. It would be an infraction of the most important principles of law if the Committee should decide that a general Act of Parliament, making void a certain class of marriages, could impose a personal incapacity

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on a party to whatever country he might go, though by the law of that country his marriage was good. It could only be out of excessive caution that it was considered necessary to ask the consent of the Sovereign of this country to the marriage of the son of the present King of Hanover. The law of the place of the contract must alone decide on its validity. *Scrimshire v. Scrimshire* (1) recognised that doctrine, and it was there said, that from the mischief and confusion that would arise to the subjects of all countries if that was not the rule, it must be inferred that by the general consent of nations, contracts of this kind must be determined by the laws of the country where they were made. How otherwise would it be possible to decide, where two parties had different places of residence? From the time of that case (1752) to this moment the national faith of this country has been pledged, that the law of the place of the marriage is binding upon the law of England. *Compton v. Bearcroft* (2), and *Ryan v. Ryan* (3), adopt that principle. A different rule would be most mischievous. It would enable a man to get married at a foreign place, and give him the privilege of breaking his marriage when he came back here. The language of the Court in *Scrimshire v. Scrimshire* leads directly to the conclusion that the law will not permit such mischievous inconsistencies; and so does the language of this House in the cases of *Warrender v. Warrender* (4), and *Birtwhistle v. Vardill* (5). Incapacity exists in many cases in law. It is said that an infant is incapable of binding himself except for necessities; that he is incapable of borrowing money and doing many other things; and yet it is unquestionable that this supposed incapacity, if set up as a defence in a country where a contract is attempted to be enforced, must be shown to be applicable to the contract in the country where that contract was made: *Male v. Roberts* (6). That is the case in other countries as well as in England. France affords, perhaps, the only exception to the rule. The Code Civil, in the Preliminary Title (7), says, that “the laws relating to the state or capacity of persons govern Frenchmen, even when residing in a foreign country.” But in another part of the Code (8) this general proposition is limited by a specific declaration, that “the marriage of a Frenchman in a foreign country shall be valid if celebrated according to the forms used

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| (1) 2 Hagg. Cons. Rep. 395, 417. | (5) 51 R. R. 139 (2 Cl. & Fin. 571; 7 |
| (2) 2 Hagg. Cons. Rep. 443, 444, n.; | Cl. & Fin. 895). |
| Bull. N. P., 6th ed. pp. 113, 114. | (6) 6 R. R. 823 (3 Esp. 163). |
| (3) 2 Phill. 332. | (7) Art. 3. |
| (4) 37 R. R. 188 (2 Cl. & Fin. 488). | (8) Art. 170. |

in such country." It goes on to provide for the observance of certain forms, which it is manifest could never be required nor observed in any country where the law of France did not prevail, and the general declaration must therefore be taken as overriding the specific provision; and, in fact, the Courts of France have often held that a marriage of a French subject, celebrated according to the law of the place where it was contracted, was valid. This principle has again and again been distinctly upheld by the American Courts; and Story (1) refers to cases where men struck with incapacity by the rules of law in their own State, went away into another for the purpose of evading the law, performed the act which they were incapable of performing in their own State, and then returned to that State where the validity of what they had elsewhere done was acknowledged. One of these cases was the marriage of a white man with a black woman, such marriage being absolutely prohibited in the State to which the man belonged. This principle is so important, that unless the Legislature has most clearly and expressly declared an intention to avoid it, such intention cannot be implied: *Dwarris on Statutes* (2). The passing of this Act was strongly opposed, and it *may reasonably be supposed that the words which are necessary to give it effect abroad were purposely left out. Her present Majesty (had she married before her accession to the throne), the Princess Charlotte, and the Princess Augusta of Cambridge, might have married, and their issue would have been exempt from the operation of the Act. It does not extend to Ireland, and therefore there can be no doubt, that if the line of succession should come into the Duke of Sussex, the present claimant would be entitled to the allegiance of Ireland. That country, for such a purpose, stands in the situation of a foreign country.

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(LORD BROUGHAM: Not as to purposes of the succession of the Crown, for there is an Irish Act which gives the Crown of Ireland to any one who holds the Crown of England.)

The words of this Act are indefinite and vague, and cannot be permitted to have effect against the great principles of the law which all nations have recognised. There has been clearly a marriage in fact, in this case, one which by the general law of England would be valid, but which is sought to be avoided by the doubtful terms of this Act of Parliament, by straining the words of a disabling

(1) *Conflict of Laws*, c. iv. ss. 102 *et seq.* (2) *Vol. 2*, p. 647.

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and penal statute. No such violation of known and universally recognised principles will be sanctioned by this Committee.

THE LORD CHANCELLOR :

I propose to put a question to the Judges. It is upon the construction of the Royal Marriage Act. If the Judges should wish for any further argument, any argument from the *Attorney-General*, they will intimate their wishes to me, and I will take care to make the necessary arrangements. I propose to submit the following question to the Judges :

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“Evidence being offered of a marriage solemnised *at Rome in the year 1793 by an English priest, according to the rites of the Church of England, between A. B., a son of his Majesty King George III., and C. D., a British subject, without the previous consent of his said Majesty, assuming such evidence to have been sufficient to establish a valid marriage between A. B. and C. D. independently of the provisions of the statute 12 Geo. III. c. 11, would it be sufficient, having regard to that statute, to establish a valid marriage in a suit, in which the eldest son of A. B. claims lands in England, as heir of A. B., by virtue of such alleged marriage ?”

The Judges requested time to consider the question, which was granted.

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TINDAL, Ch. J. now delivered the opinion of the Judges :

In answer to this question, I am requested by my brethren to inform your Lordships, that it is the unanimous opinion of all the Judges who have heard the argument in this case, that assuming the evidence given to have been sufficient to establish a valid marriage between A. B. and C. D. independently of the provisions of the statute 12 Geo. III. c. 11, it is not sufficient, having regard to that statute, to establish a valid marriage in a suit, in which the eldest son of A. B. claims lands in England, as heir of A. B., by virtue of such alleged marriage. The question turns entirely upon the legal construction of that statute, and is shortly this : whether, to bring a marriage within the prohibition of that statute, it is necessary that it should have been contracted within the realm of England ; or whether the statute extends to prohibit and to annul marriages, wherever the same be contracted or solemnised, either within the realm of England or without ?

It is scarcely necessary to observe, that as your Lordships' question states that A. B. is a son of his late Majesty King George III., it applies to a descendant of the body of his late Majesty King George II., not being the issue of any Princess married into a foreign family; so that A. B. falls precisely within the class or description of persons with respect to whose marriage the statute intends to legislate; and that, as he falls within that description or class, the statute may be considered as if it had been passed with respect to him personally and individually; as if it had enacted in express terms, "That A. B. shall not be capable of contracting matrimony without the previous consent of the reigning Sovereign, signified under the Great Seal, and declared in Council." And again: "That the marriage of A. B., without such consent first had and obtained, shall be null and void to all intents and purposes."

My Lords, the only rule for the construction of Acts of Parliament is, that they should be construed according to the intent of the Parliament which passed the Act. If the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense. The words themselves alone do, in such case, best declare the intention of the lawgiver. But if any doubt arises from the terms employed by the Legislature, it has always been held a safe mean of collecting the intention, to call in aid the ground and cause of making the statute, and to have recourse to the preamble, which, according to Chief Justice DYER (1), is "a key to open the minds of the makers of the Act, and the mischiefs which they intended to redress."

And, looking to all these grounds of interpretation, we think they concur, in the present instance, in demanding that construction of the statute at which we have arrived. For in the first place, the words of the statute itself appear to us to be free from ambiguity. The prohibitory words of it are general: "That no one of the persons therein described shall be capable of contracting matrimony." And again: "That every marriage or matrimonial contract of any such person shall be null and void to all intents and purposes whatsoever." The statute does not enact an incapacity to contract matrimony within one particular country and district or another, but to contract matrimony generally, and in the abstract. It is an incapacity attaching itself to the person of A. B., which he carries with him wherever he goes. But as a

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(1) *Stowel v. Lord Zouch*, Plowden, 369.

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marriage once duly contracted in any country will be a valid marriage all the world over, the incapacity to contract a marriage at Rome is as clearly within the prohibitory words of the statute as the incapacity to contract in England. So again, as to the second or annulling branch of the enactment, "that every marriage without such consent shall be null and void;" the words employed are general, or, more properly, universal; and cannot be satisfied in their plain, literal, ordinary meaning, unless they are held to extend to all marriages, in whatever part of the world they may have been contracted or celebrated.

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The words of the second section throw light upon and confirm the interpretation to be given to the first. By the second section the descendants of the body of Geo. II., being above the age of 25 years, who shall persist in their resolution to contract a marriage disapproved of or dissented from by the King, upon giving notice to the Privy Council, are enabled, at *any time from the expiration of 12 calendar months after such notice, to contract such marriage, and such marriage may be duly solemnised, without the previous consent of his Majesty, his heirs or successors; and such marriage is declared to be good, as if that Act had never been made, unless both Houses of Parliament shall, before the expiration of the said 12 months, expressly declare their disapprobation of such intended marriage. The words employed in this section are the same as in the first, "to contract a marriage," and "marriage" generally, and without any reference to the country wherein the marriage is contracted or solemnised. But as no doubt could be entertained by any one but that a marriage, taking place with the due observance of the requisites of the second section, would be held equally valid whether contracted and celebrated at Rome or in England; so we think it would be contrary to all established rules of construction if the very same words in the first section were to receive a different sense from those in the second; if it should be held that a marriage at Rome, contracted with reference to the second section, is made valid, and at the same time a marriage at Rome is not prohibited under the first.

Indeed it is scarcely supposable that the Legislature should have provided the minute and laborious machinery of the second section; that it should have interposed such checks against a marriage without consent, and at the same time have rendered such a marriage ultimately valid, in one given state of circumstances; if the party himself who is the subject of such legislation, by an easy

journey, or a voyage of a few hours, could render all these provisions useless, and set the statute at defiance, by contracting *a marriage abroad with whomever he thought proper. And it is not unworthy of remark, whilst we are looking to the body of this Act in order to discover its interpretation, that the very exception from the prohibitory clause, of the issue of those Princesses who have married or may marry into foreign families, affords some proof that marriages abroad could not have been out of the view or contemplation of the Legislature at the time of passing the Act, as such marriages in all probability might not unfrequently be celebrated out of England.

It was contended in the course of the argument at your Lordships' Bar, that an Act of the English Legislature can have no binding force beyond, or out of, the realm of England; and if by this is meant only, that it can have no obligatory force upon the subjects of another State, the position is no doubt correct in its full extent; but it is equally certain that an Act of the Legislature will bind the subjects of this realm, both within the kingdom and without, if such was its intention. Indeed it was admitted by the learned counsel for the claimant, that if there had been found in this statute the words "marriages within the realm of England, or without," or any other words equipollent thereto, under such an enactment the capacity to contract a marriage at Rome would have been taken away, and the marriage, there solemnised, would have been made null and void. But if the words actually found in the statute are comprehensive enough to include all marriages, as well those within the realm as without, as we think they are; and if, at the same time, the restraining the sense of those words, to marriages within England, must necessarily defeat the object and purpose of the Act, as we think it would; then it seems to follow, *that the construction of the Act must be the same, whether those words are found within the statute or not. Surely, if the marriage of a descendant of George the Second, contracted or celebrated in Scotland or Ireland, or on the Continent, is to be held a marriage not prohibited by this Act, the statute itself may be considered as virtually and substantially a dead letter from the first day it was passed.

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But the object and purpose for which the Act was passed, and the mischief intended to be prevented thereby, are clear, and leave no doubt as to the proper construction of the Act. It was founded upon the policy and expediency which requires that no marriage of

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any branch of the Royal Family should be contracted, which might be detrimental to the interests of the State, either at home or abroad. The object declared by the preamble is, "more effectually to guard the descendants of his late Majesty King George the Second, from marrying without the approbation of the reigning Sovereign;" it declares "the marriages of the Royal Family to be of the highest importance to the State;" and "that therefore the Kings of this realm have ever been entrusted with the care and approbation thereof." But this object is frustrated, the mischief is remediless, and the power of the Sovereign nugatory, if the marriage, which in England would have been confessedly void, is to be held good and valid when celebrated out of the country.

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It was argued on the part of the claimant, that as it is directed in the 1st section of the Act, that the consent under the Great Seal shall be set out in the licence and register of the marriage, and as this direction can only be applicable to the case of a marriage celebrated in this country, so the prohibition must be construed as confined to a marriage in this country *only, and as not extending to a foreign marriage. But to this objection it appears to us to be a sufficient answer, that the only words in that section that are essential to make the marriage a valid marriage, are those which require "the previous consent of his Majesty, signified under the Great Seal, and declared in Council;" and that the words which follow, directing such consent to be set out in the licence and register of the marriage, are, as the very words import, directory only, not essential, and are applicable to those cases alone where they can be applied, namely, to the case of a marriage celebrated in England by licence. For it would be impossible to contend, if the marriage of A. B. had been celebrated at Rome, with the previous consent of his Majesty King George the Third, signified under the Great Seal, and declared in Council, that such marriage would not have been good and valid to all intents and purposes, although the observance of the direction that such consent should be inserted in the licence and register of the marriage, had become, in that case, impracticable.

It was further contended in argument, that inasmuch as by the 3rd section of the Act all persons who wilfully and knowingly presume to solemnise, or assist or be present at the celebration of any marriage, or at the making of any matrimonial contract, without such consent, shall incur the penalties of a *premunire*: and as there is no provision made in this section for the trial and

consequently the punishment of the offender where the offence shall be committed out of England, the necessary inference must be, that the statute itself does not extend to prohibit a marriage out of England: but we think the inference that the penal clause is itself defective, in not making provision for the trial of British subjects when they violate the statute out of *the realm, is the more just and reasonable inference; not that we should refuse, on that account, to give the plain words of the statute their necessary force, and hold the enactment itself to be substantially useless and inoperative.

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We therefore think, for the reasons humbly submitted to your Lordships, that the eldest son of A. B., under the circumstances stated in your Lordships' question, and regard being had to the statute 12 Geo. III. c. 11, could not make out a good title, as heir to A. B., to the lands sought to be recovered.

THE LORD CHANCELLOR :

Your Lordships will, I am sure, agree with me in expressing our thanks to the learned Judges for the care and attention which they have bestowed on this subject, amidst their other incessant and laborious occupations. I think, from the nature of the question, it may be proper that we should postpone the further consideration of this case.

LORD BROUGHAM :

I agree with my noble and learned friend in tendering our thanks to the learned Judges for their most lucid, able, and convincing argument, which the learned CHIEF JUSTICE has just delivered. I have but one doubt about the postponement, which is on account of putting the parties to the expense of an additional attendance: I am quite prepared to give my opinion on the case at this moment.

THE LORD CHANCELLOR :

I suggested the postponement with a view to consult the wishes of other noble Lords; not from any doubt I entertain, for I entirely concur in the opinion on the statute which has been expressed by the learned Judges. In fact, I never *entertained any doubt upon the words, the object of the Act, or the provisions of that particular section, the second section, to which the observations of the learned CHIEF JUSTICE have been directed. The answer which has been given to the question proposed by your Lordships is decisive

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of the whole case, because the same rule that would apply to estates would apply to honours.

LORD COTTENHAM :

My Lords, I do not apprehend that there is any difference of opinion as to the construction of the Royal Marriage Act ; and if so, it would seem to be better to dispose of the case at once. I am of opinion that the marriage is invalid under the statute.

THE LORD CHANCELLOR :

I shall therefore propose to resolve, that it is the opinion of the Committee that the claimant has not made out his claim.

LORD BROUGHAM :

[*151] My Lords, in agreeing to the motion of my noble and learned friend, and in expressing my entire concurrence with the opinion of the learned Judges, I do so upon the ground not only that the object of the Act is clear, but that the words of the Act are sufficient (for that is necessary also) to accomplish the manifest purpose of the Act. I say this, because it is not a sufficient ground to hold that the purpose is clear, unless the words are sufficient to accomplish that purpose, though otherwise the Act might have been nugatory. It was so in the case of the General Marriage Act. It was quite clear that that Act was intended to prevent minors from marrying without consent, unless with the publication of banns ; and yet notwithstanding that, by going to Scotland, a very short journey, the parties intended to *be affected by the Act, namely, wealthy persons, could easily accomplish the purpose, and defeat the Act. My opinion is, that if that Act had used the same phraseology as this, and had rendered the parties incapable of contracting matrimony, we should never have heard of *Compton v. Bearcroft* (1), and *Ilderton v. Ilderton* (2). At all events, there is sufficient in my mind to stamp with perfect accuracy the opinions delivered by the learned Judges. Parties are rendered incapable of contracting matrimony, and not merely, as in the case of Lord Hardwicke's Act, the marriage rendered null and void. It therefore follows that a Prince going abroad and contracting matrimony, is, for all British purposes, with a view to the Crown and the rights of Peerage, incapable of contracting matrimony ; and any marriage so contracted is null and void.

(1) Bull. N. P. 6th ed. 113; 2 (2) 2 H. Bl. 145.
Hagg. Cons. Rep. 443, 444, n.

THE LORD CHANCELLOR :

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I do not entertain the slightest doubt of the sufficiency of the evidence to establish the marriage as a marriage in fact. (*Vide infra*, p. 58.)

LORD DENMAN :

After the observations of my noble and learned friends, there does not appear to me to be any sufficient reason for postponing the decision on this claim. I join in the thanks which I think we owe to the learned Judges for the very clear and satisfactory document which has been read before your Lordships, and I am happy and very much satisfied in being enabled to say that my opinion entirely agrees with that of your Lordships ; I think the operative words of the Royal Marriage Act, taken alone, are perfectly clear to show that this is no marriage by the law of England.

LORD CAMPBELL :

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My Lords, I agree with my noble and learned friend, the LORD CHANCELLOR, that, as the evidence now stands, there would be a marriage in fact ; because the evidence that has been given to us of the Roman law, uncontradicted as it is, would prove that a marriage at Rome of English Protestants, contracted according to the rites of their own Church, would be recognised as a marriage by the Roman law, and therefore would be a marriage all over the world. I own that that evidence rather surprised me. I had imagined that it was impossible there could be a valid marriage at Rome, between Protestants, by a Protestant clergyman, such as the Roman law would recognise. As the evidence stands at your Lordships' Bar, it would appear, however, that the Roman law would recognise such a marriage without the religious ceremonies required by the Romish Church before (1) the Council of Trent, namely, without the intervention of a priest, and would treat it as a marriage valid by the universal law of the Church before the date of the decree of that Council ; and it would appear that the decree of the Council of Trent respecting marriages, was not meant to apply to the marriage of Protestants, who could not conform to it. That, my Lords, I think is the universally prevailing opinion. But when we come to the Royal Marriage Act, it seems to me that there is an insuperable bar to the validity of this marriage. The elaborate opinion that has been delivered by the LORD CHIEF JUSTICE of the Common Pleas

(1) *Sic*, but the context requires "since."—F. P.

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appears to me to have entirely exhausted this part of the subject. It accords with the opinion I had originally formed. I kept my mind, however, entirely open till I had heard the arguments on both sides, and I now am confirmed in my previous opinion by the legal reasoning laid before us in the most admirable opinion *we have this day heard delivered by the LORD CHIEF JUSTICE. I entirely concur with that opinion. I have no doubt that it is competent to the British Legislature to pass a law making invalid the marriage of particular British subjects all over the world. I have no doubt that it was the object of that Act of Parliament to invalidate marriages of the descendants of George the Second (with the exception of Princesses married into foreign Royal Families), without the consent of the Crown, wherever those marriages might be celebrated; and I am clearly of opinion that the intention is sufficiently testified by the language which has been employed.

THE LORD CHANCELLOR :

My Lords, I wish to explain, that by a "marriage in fact," I mean that I think the evidence is sufficient to show that these parties were married at Rome by a clergyman of the Church of England, in conformity with the rites and ceremonies of the English Church. With regard to the evidence, as referred to by my noble and learned friend (Lord CAMPBELL), that evidence is sufficient, as it at present stands, to show that this marriage would be a valid marriage of Protestants at Rome, according to the law of Rome : whether such a marriage would be a valid marriage in this country for any purpose independently of the Royal Marriage Act, is a point upon which I give no opinion.

LORD BROUGHAM :

I give no opinion upon that.

LORD COTTENHAM :

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My Lords, after the discussion which has taken place, I think it right to say that my opinion is formed entirely and exclusively upon the Royal Marriage Act. It is only that part of the case which has been concluded, and that is the only part *upon which we can properly express an opinion. I entirely agree in the opinion which has been expressed by the learned Judges, inasmuch as by the construction of the Royal Marriage Act, whether the marriage would be valid by the law of Rome or not, it would not be valid by the law of this country. My opinion, therefore, is against the claim.

It was then resolved that the claimant had not made out his claim to be Duke of Sussex, Earl of Inverness, and Baron of Arklow: and the Chairman was directed to report the same to the House.

The resolution was accordingly reported to the House, and affirmed. And the same was reported by the House to her Majesty.—Lords' Journals, 9th July, 1844.

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DANIEL O'CONNELL AND OTHERS v. REG. (1).

(11 Clark & Finnelly, 155—426; S. C. 9 Jur. 25; 1 Cox, C. C. 413.)

Criminal pleading—Indictment—Witnesses before grand jury—Challenge to the array—Findings—Judgment—Recognizances—Arrest of judgment—Error.

A general judgment for the Crown, on an indictment containing several counts, one of which is bad, and where the punishment is not fixed by law, cannot be supported.

A good finding on a bad count, and a bad finding on a good count, stand on the same footing; both being nullities.

Where a count in an indictment contains only one charge against several defendants, the jury cannot find any one of the defendants guilty of more than one charge.

Where, therefore, a count in an indictment charged several defendants with conspiring together to do several illegal acts, and the jury found one of them guilty of conspiring with some of the defendants to do one of the acts, and guilty of conspiring with others of the defendants to do another of the acts, the finding is bad, as amounting to a finding that one defendant was guilty of two conspiracies, though the count charged only one.

An indictment against different defendants consisted of several counts charging them with various illegal acts. Some of the counts were bad, and on some of the good counts there were bad findings. The judgment against each of the defendants was stated to be in respect of "his offences aforesaid."

Held, that each count must be considered as charging a separate offence, and that the expression "his offences aforesaid," must be treated as extending to all the offences of which each defendant had been found guilty; and as some of the counts and some of the findings were bad, such judgment could not be supported (2).

Upon a count in an indictment against eight defendants, charging one conspiracy to effect certain objects, a finding that three of the defendants are guilty generally, that four of them are guilty of conspiring to effect some, and not guilty as to the residue of these objects, is bad in law, and repugnant; inasmuch as the finding that the three were guilty, was a finding that they were guilty of conspiring with the other five to effect all

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Lord
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Lord
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TINDAL,
Ch. J.

PATTESON, J.

MAULE, J.

COLTMAN, J.

WILLIAMS, J.

GURNEY, B.

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(1) Cited in a great many cases, among others *Castro v. Reg.* (1881) 6 App. Cas. 229, 235; *Mackonochie v. Lord Penzance* (1881) *ib.* 424, 445; *Enraght v. Lord Penzance* (1882) 7 App. Cas. 240, 250, 257; *R. v. Manning* (1883) 12 Q. B. D. 241, 243, 244, 246, 53 L. J. M. C. 85, 51 L. T.

121; *Mogul Steamship Co. v. McGregor, Gow & Co.* (1885-9) 15 Q. B. D. 476, 484, 54 L. J. Q. B. 540; on appeal, 23 Q. B. Div. 598, 616, 624, 58 L. J. Q. B. 465 (affd. in H. L. [1892] A. C. 25, 61 L. J. Q. B. 295).

(2) Cp. *Mulcahy v. Reg.* (1868) L. R. 3 H. L. 306.

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the objects of the conspiracy; whereas, by the same finding, it appears that the other five were guilty of conspiring to effect only some of those objects.

A count charging defendants with conspiring "to cause and procure divers subjects to meet together in large numbers for the unlawful and seditious purpose of obtaining, by means of the intimidation to be thereby caused, and by means of the exhibition and demonstration of great physical force at such meetings, changes in the Government, laws, and Constitution of the realm," is bad: first, because "intimidation" is not a technical word having a necessary *meaning in a bad sense; and secondly, because it is not distinctly shown what species of intimidation is intended to be produced, or on whom it is intended to operate.

A plea in abatement is a dilatory plea, and must be pleaded with strict exactness. Where, therefore, defendants in an indictment in the Court of Queen's Bench in Dublin, pleaded in abatement, that the indictment was found on the evidence of witnesses who had not been sworn in open Court, according to the Act 56 Geo. III. c. 87; but did not set out in the plea the names of those witnesses, nor allege that there were no other witnesses duly sworn on whose evidence the indictment was found, nor allege that the witnesses on whose evidence it was found, were not affirmed, the plea was held bad.

And for the same reasons, a plea in abatement on the ground that the swearing of the witnesses had not been duly certified by the signature of the foreman or other member of the grand jury, under the 1 & 2 Vict. c. 37, was held bad.

The 56 Geo. III. c. 87, is repealed by the 1 & 2 Vict. c. 37 (1); and this latter Act applies to the Court of Queen's Bench, as well as to the Courts of Assize and Quarter Sessions, in Ireland.

A challenge to the array in the Court of Queen's Bench in Dublin, alleged that the jurors' book had not been completed in conformity with the requisites of the Act 3 & 4 Will. IV. c. 9; that the names of 59 persons, duly qualified to serve on juries, had been fraudulently omitted from the general list from which the book was made up, and from the book itself, for the purpose of prejudicing the defendants; but the challenge did not contain any specific accusation against the sheriff or other returning officer concerned in preparing the list. *Qu.* Whether the causes of challenge to the array, thus alleged, were sufficient? *Per Lord DENMAN:* They were sufficient.

Qu. Whether a judgment which directs that each of several defendants shall enter into recognizances to keep the peace, &c. "for the space of seven years next ensuing the acknowledgment thereof," is good, as no period is fixed for entering into the recognizances.

Several defendants, charged in one indictment with different illegal acts, severed in their defence; and being convicted and sentenced to different punishments, brought separate writs of error. Held, that they were entitled to appear by several counsel, and that the counsel were severally entitled to reply.

The counsel for the Crown, where the Crown is the defendant in a writ of error, is not necessarily entitled to the final reply, though the Crown is the real litigant party.

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THIS was a writ of error, brought upon a judgment of the Court of Queen's Bench in Ireland. The defendants in the Court below had been indicted for a conspiracy. The caption and indictment were in the following form:

(1) But see 61 & 62 Vict. c. 37, s. 105, sch. 5.

"Pleas before the Queen at Dublin, of Michaelmas Term, in the seventh year, &c.

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"COUNTY OF THE CITY } Be it remembered, that on Thursday, the
DUBLIN, to wit. } 2nd day of November, in the same Term, in
the Court of our lady the Queen, before the Queen herself, at
Dublin, in the county of the city of Dublin, upon the oath and
affirmation of twelve good and lawful men of the body of the county
of the city of Dublin, now here sworn, affirmed, and charged to
inquire for our said lady the Queen, and for the body of the said
county of the city of Dublin, it is presented as follows, that is
to say :

"County of the City } The jurors for our lady the Queen, upon their
of Dublin, to wit. } oath and affirmation present and say, that

Daniel O'Connell, of &c., John O'Connell, Thomas Steele, Thomas
Matthew Ray, Charles Gavan Duffy, the Rev. Thomas Tierney,
clerk, the Rev. Peter James Tyrrell, and Richard Barrett, of &c.,
unlawfully, maliciously, and seditiously contriving, intending, and
devising to raise and create discontent and disaffection amongst the
liege subjects of our said lady the Queen, and to incite the said
liege subjects to hatred and contempt of the Government and Con-
stitution of this realm as by law established, and to excite hatred,
jealousies, and ill-will amongst different classes of the said subjects,
and to create discontent and disaffection amongst divers of the said
*subjects, and amongst others, her Majesty's subjects serving in
her Majesty's army; and further contriving, intending, and
devising to bring into disrepute, and to diminish the confidence of
her Majesty's subjects in the tribunals duly and lawfully con-
stituted for the administration of justice; and further unlawfully,
maliciously, and seditiously contriving, intending, and devising, by
means of intimidation and the demonstration of great physical
force, to procure and effect changes to be made in the Government,
laws, and Constitution of this realm as by law established; hereto-
fore, to wit, on the 13th of February, A.D. 1843, with force and
arms, to wit, at the parish of Saint Mark, in the county of the city
of Dublin, unlawfully, maliciously, and seditiously did combine,
conspire, confederate, and agree with each other, and with divers
other persons whose names are to the jurors aforesaid unknown,
to raise and create discontent and disaffection amongst the liege
subjects of our said lady the Queen, and to excite such subjects to
hatred and contempt of the Government and Constitution of this
realm as by law established, and to unlawful and seditious

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opposition to the said Government and Constitution ; and also to stir up jealousies, hatred, and ill-will between different classes of her Majesty's subjects, and especially to promote amongst her Majesty's subjects in Ireland feelings of ill-will and hostility towards and against her Majesty's subjects in the other parts of the United Kingdom of Great Britain and Ireland, and especially in that part of the said United Kingdom called England ; and further to excite discontent and disaffection amongst divers of her Majesty's subjects serving in her said Majesty's army ; and further to cause and procure, and aid and assist in causing and procuring divers subjects *of our said lady the Queen, unlawfully, maliciously, and seditiously to meet and assemble together in large numbers, at various times, and at different places within Ireland, for the unlawful and seditious purpose of obtaining, by means of the intimidation to be thereby caused, and by means of the exhibition and demonstration of great physical force at such assemblies and meetings, changes and alterations in the Government, laws, and Constitution of this realm as by law established ; and further to bring into hatred and disrepute the Courts by law established in Ireland for the administration of justice, and to diminish the confidence of her said Majesty's liege subjects in Ireland in the administration of the law therein, with the intent to induce her Majesty's subjects to withdraw the adjudication of their differences with and claims upon each other from the cognizance of the said Courts by law established, and to submit the same to the judgment and determination of other tribunals, to be constituted and contrived for that purpose."

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The count then went on to state at full length the various acts which were alleged as overt acts in support of the charge of conspiracy. These overt acts were alleged to be done in order " to excite the liege subjects of our lady the Queen to discontent with, and hatred of, and disaffection to the Government, laws, and Constitution of this realm as by law established, in contempt of our said lady the Queen and the laws of this realm, to the evil example of all others in the like case offending, and against the peace of our said lady the Queen, her Crown and dignity."

2nd Count. The second count was in exactly the same terms as the first, but omitted to allege any overt acts.

[160] The third count was in the following form :

3rd Count. That the said defendants, unlawfully, maliciously, and seditiously contriving, &c. to raise and create discontent and disaffection amongst the liege subjects of the Queen, and to excite

the said liege subjects to hatred and contempt of the Government and Constitution of this realm as by law established, and to excite hatred, jealousies, and ill-will amongst different classes of the said subjects, and to create discontent and disaffection amongst divers of the said subjects, and amongst others, her Majesty's subjects serving in her Majesty's army ; and further contriving, intending, and devising to bring into disrepute, and to diminish the confidence of her Majesty's subjects in the tribunals duly and lawfully constituted for the administration of justice ; and further unlawfully, maliciously, and seditiously contriving, intending, and devising, by means of intimidation and the demonstration of great physical force, to procure and effect changes to be made in the Government, laws, and Constitution of this realm as by law established ; heretofore, to wit, on the 13th of February, A.D. 1843, with force and arms, to wit, at &c. aforesaid, unlawfully, maliciously, and seditiously did combine, conspire, confederate, and agree with each other, and with divers other persons whose names are to the jurors aforesaid unknown, to raise and create discontent and disaffection amongst the liege subjects of our said lady the Queen, and to excite such subjects to hatred and contempt of the Government and Constitution of this realm as by law established, and to unlawful and seditious opposition to the said Government and Constitution, and also to stir up hatred, jealousies, and ill-will between different classes of her Majesty's subjects, and especially to promote amongst *her Majesty's subjects in Ireland feelings of ill-will and hostility towards and against her Majesty's subjects in the other parts of the said United Kingdom, and especially in that part of the said United Kingdom called England ; and further to excite discontent and disaffection amongst divers of her Majesty's subjects serving in her said Majesty's army ; and further to cause and procure, and aid and assist in causing and procuring divers subjects of our said lady the Queen to meet and assemble together in large numbers at various times and at different places within Ireland, for the unlawful and seditious purpose of obtaining, by means of the intimidation to be thereby caused, and by means of the exhibition and demonstration of great physical force at such assemblies and meetings, changes and alterations in the Government, laws, and Constitution of this realm, as by law established ; and further to bring into hatred and disrepute the Courts by law established in Ireland for the administration of justice, and to diminish the confidence of her said Majesty's liege subjects in Ireland in the administration of the law

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therein, with the intent to induce her Majesty's subjects to withdraw the adjudication of their differences with and claims upon each other from the cognizance of the said Courts by law established, and to submit the same to the judgment and determination of other tribunals, to be constituted and contrived for that purpose, in contempt, &c.

The 4th count was the same as the third, omitting the charges as to creating discontent and disaffection among the subjects serving in the army, and as to the diminishing the confidence of the people in the tribunals established by law, and procuring them to withdraw the cognizance of their differences from such tribunals.

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5th Count. That the said defendants, unlawfully, seditiously, &c. intending to cause and create discontent and disaffection amongst the liege subjects of our said lady the Queen, and to excite the said subjects to hatred and contempt of the Government and Constitution of this realm as by law established, unlawfully, maliciously, and seditiously did combine, conspire, confederate, and agree with each other and with divers other persons whose names are unknown, to raise and create discontent and disaffection amongst the liege subjects of our said lady the Queen, and to excite the said subjects to hatred and contempt of the Government and Constitution of this realm as by law established, and to unlawful and seditious opposition to the said Government and Constitution, and also to stir up jealousies, hatred, and ill-will between different classes of her Majesty's subjects, and especially to promote amongst her Majesty's subjects in Ireland feelings of ill-will and hostility towards and against her Majesty's subjects in the other parts of the said United Kingdom, and especially in that part of the said United Kingdom called England, in contempt, &c.

6th Count. That the said defendants, unlawfully, maliciously, and seditiously contriving, intending, and devising, by means of intimidation and the demonstration of great physical force, to procure and effect changes to be made in the Government, laws, and Constitution of this realm as by law established; heretofore, to wit, on the 13th February, A.D. 1843, with force and arms, to wit, &c. aforesaid, unlawfully, maliciously, and seditiously did combine, conspire, confederate, and agree with each other, and with divers other persons whose names are to the jurors aforesaid unknown, to cause and procure, and aid and assist in *causing and procuring, divers subjects of our said lady the Queen to meet and assemble together in large numbers at various times and at different places

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within Ireland, for the unlawful and seditious purpose of obtaining, by means of the intimidation to be thereby caused, and by means of the exhibition and demonstration of the great physical force at such assemblies and meetings, changes and alterations in the Government, laws, and Constitution of this realm as by law established, in contempt, &c.

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The 7th count was the same as the 6th, with the addition of these words: "And especially, by the means aforesaid, to bring about and accomplish a dissolution of the Legislative Union now subsisting between Great Britain and Ireland, in contempt," &c.

8th Count. That the said defendants, unlawfully and seditiously intending, &c. to bring into disrepute and to diminish the confidence of her Majesty's subjects in the tribunals duly and lawfully constituted in Ireland for the administration of justice; on, &c. with force, &c. at &c., unlawfully, maliciously, and seditiously did combine, conspire, confederate, and agree with each other and with divers other persons whose names are to the jurors unknown, to bring into hatred and disrepute the tribunals by law established in Ireland for the administration of justice, and to diminish the confidence of her said Majesty's liege subjects in Ireland in the administration of the law therein, with the intent to induce her Majesty's subjects to withdraw the adjudication of their differences with and claims upon each other from the cognizance of the said tribunals by law established, and to submit the same to the judgment and determination of other tribunals to be constituted and contrived for that purpose, in contempt, &c.

The 9th count was the same as the 8th, omitting from the introductory part the words "in Ireland," after the words "duly and lawfully constituted;" and in the last part of the count, after the words "administration of the law therein," omitting the allegation as to withdrawing the adjudication of differences, and substituting the following: "and to assume and usurp the prerogative of the Crown in the establishment of Courts for the administration of the law, in contempt," &c.

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The 10th count was the same as the 8th in the introductory part, but the charge was in general terms, that the defendants unlawfully, maliciously, and seditiously did combine, conspire, confederate, and agree with each other and with divers other persons whose names are unknown, to bring into hatred and disrepute the tribunals by law established in Ireland for the administration of justice, and to diminish the confidence of her

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Majesty's liege subjects in Ireland in the administration of the laws therein, in contempt, &c.

11th Count. That the said defendants, unlawfully, &c. intending, &c., by means of intimidation and the demonstration of physical force, and by causing and procuring large numbers of persons to meet and assemble together in divers places and at divers times within Ireland, and by means of seditious and inflammatory speeches and addresses to be made and delivered to the said persons so to be assembled, and also by means of publishing, &c. to the subjects of her said Majesty divers unlawful and seditious writings; and further intending, by the several means aforesaid, to intimidate the Lords Spiritual and Temporal and the Commons of the Parliament of the United Kingdom of Great Britain and Ireland, and *thereby to effect and bring about changes in the laws and Constitution of this realm as by law established; heretofore, to wit, on the 18th February, A.D. 1843, to wit, at, &c. aforesaid, unlawfully and seditiously did combine, &c. with each other and with other persons whose names are unknown, to cause large numbers of persons to meet together in divers places and at divers times within Ireland, and by means of seditious speeches, &c. to be made and delivered at the said places and times respectively, and also by means of the publishing to the subjects of her said Majesty divers unlawful, malicious, and seditious writings and compositions, to intimidate the Lords Spiritual and Temporal and the Commons of the Parliament of the United Kingdom of Great Britain and Ireland, and thereby to effect and bring about changes and alterations in the laws and Constitution of this realm as now by law established, in contempt, &c.

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To this indictment the plaintiffs in error severally pleaded in abatement, that the bill of indictment was found a true bill upon the evidence of divers, to wit, four witnesses produced before and examined by the jurors aforesaid; and that the said witnesses were not, nor was any one of them, previously to their being so examined by the jurors aforesaid, sworn in the said Court of our lady the Queen, before the Queen herself, according to the provisions of the 56 Geo. III. c. 87, s. 1.

To these pleas the *Attorney-General* demurred, and the plaintiffs in error joined in demurrer. The question raised by the demurrer was argued in the same Term, and the demurrer was allowed by the Court, and judgment given that each of the parties should answer over to the indictment; whereupon they severally *pleaded

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Not guilty, and jury process issued for the trial on the 15th January, 1844 (1). O'CONNELL
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By an order of the Court, dated in Hilary Term, 1844, it was ordered that the issues joined in this case be tried at the Bar of the Court; and afterwards, in the same Term, the following order was made: "It is ordered and directed, according to the form of the statute in that case made and provided, that in case the trial in this cause, so fixed as aforesaid for the 15th day of January in this same Term, should not terminate on or before the 31st day of January, being the last day of same Hilary Term, then that Thursday, the 1st day of February next, and every succeeding day until the 15th day of April next, or so many days thereof as shall be necessary for that purpose, be appointed for the continuation of the said trial, and that the days so fixed shall accordingly, for the purpose of such trial, be and be deemed and taken to be a part of this same Hilary Term."

On Monday, the 15th January, 1844, the trial having been called on, the defendants severally challenged the array of the jury panel.

The challenge of the defendant Daniel O'Connell was as follows:

"And the said Daniel O'Connell thereupon in his own proper person challenges the array of the said panel, because he says that at the special Sessions heretofore holden in and for the county of the city of Dublin on the 14th November, 1843, before the Rt. Hon. Frederick Shaw, Recorder of the said city, for the purpose of examining the list of jurors for the said city for the now current year 1844, pursuant to the statutable enactments in such case made and provided, the clerks of the peace in and for *the said city, duly laid before the Recorder divers, to wit, twenty lists theretofore duly furnished to the clerks of the peace by the several collectors of grand jury cess within the city, in that behalf duly authorised to make such lists, containing or purporting to contain a true list of every man residing within their respective districts of collection who was qualified and liable to serve on juries, pursuant to the statutes in such case made and provided, with the Christian and surname of each written at full length, and with the true place of abode, the title, quality, calling or business, and the nature of the qualification of every such man, in their own proper columns, pursuant to the statutable enactments in such case made and

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(1) See the report of this case in the Court of Queen's Bench, Ireland, by Shirley Trevor, Esqrs., Barristers-at-law.
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provided: And that the said several lists respectively were at the special Sessions duly corrected, allowed, and signed by the said Recorder, pursuant, &c.; and that the several persons whose names are hereinafter mentioned were then and there adjudged by the Recorder to have the qualifications hereinafter named, and that the names of the several persons were then and there contained in the said several lists so corrected, allowed, and signed as aforesaid; but that the Recorder did not, as by the said statutable enactments is directed, cause to be made out from the said several last-mentioned lists one general list, containing the names of all persons whose qualifications had been so allowed, arranged according to rank and property; nor did the Recorder thereupon, or at all, deliver such general list containing such names to the clerks of the peace, to be fairly copied by the said clerks of the peace in the same order, as by the said statutable enactments is directed, but on the contrary thereof omitted so to do; and that a certain paper-writing, purporting to be a general list purporting to be made out from such several *lists so corrected, allowed, and signed as aforesaid, was illegally and fraudulently made out by some person or persons unknown; and that the said paper-writing purporting to be such general list as aforesaid, did not contain the names of all the persons whose qualifications had been allowed upon the correcting, allowing, and signing of said lists as aforesaid by the Recorder, but omitted the names of divers, to wit, 59 persons, whose qualifications to be on said list respectively had been so allowed as aforesaid by the Recorder; which said several persons whose names were so omitted are as follows, that is to say (here followed 59 names, with their places of abode). And the said Daniel O'Connell further says, that the several persons whose names were so omitted from the fraudulent paper-writing purporting to be the general list, were, at the time of the return of the collectors' lists, and at the time of the special Sessions, and still are, severally resident within the said city, and were at the several times, and now are, duly qualified to be, and should and ought to have been placed upon the general list; and that from the fraudulent paper-writing purporting to be such general list as aforesaid, a certain book purporting to be the jurors' book of the said city for the current calendar year 1844, was made up and framed; and that from the book so purporting to be the jurors' book of the said city for the current year, was made up the special jurors' list for the said current year; and that the several persons whose names

were so omitted from the fraudulent paper-writing purporting to be such general list, were also omitted from the book purporting to be the jurors' book, and from the list purporting to be the special jurors' list: and that the several persons so omitted as aforesaid have been duly adjudged and *allowed by the said Recorder at the special Sessions to be persons having the qualification qualifying and entitling them, and each of them respectively, to be upon the jurors' book, and also to be upon the special jurors' list for the current year 1844. And the said Daniel O'Connell further saith, that the panel aforesaid made and returned to try the issue in this cause between the Crown and the said Daniel O'Connell, is arrayed and constructed from the list purporting to be the special jurors' list for the year 1844, so made out as aforesaid, to the manifest wrong and injury of the said Daniel O'Connell: and he further says that the fraudulent omission of the several persons' names from the paper-writing purporting to be such general list as aforesaid, was without the knowledge, consent, privity, contrivance, suggestion, or sanction of the said Daniel O'Connell, or of any person or persons acting for him or with him, or with his privity, or in any way whatsoever by his authority or on his behalf, or with his privity; and that the panel was so arrayed as aforesaid from the paper-writing purporting to be such special jurors' list, without the consent and against the protest and will of the said Daniel O'Connell; and that the clerk of the Crown for the city of Dublin, and the Crown solicitor acting for the Crown in this prosecution, had due notice of the premises before the said panel was so arrayed: " verification.

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The challenges of the other defendants were in the same terms, except that of the defendant Thomas Steele, which imputed " that the general list was illegally and fraudulently made out for the purpose and with the intent of prejudicing the said T. S. in this cause, by some person or persons unknown."

The *Attorney-General* demurred to all these challenges, as insufficient in law. The defendants joined *in demurrer. The demurrers were allowed, and thereupon the jury was sworn. The trial was duly continued to the 31st of January, and upon that day the following entry was made upon the record: " And now at this day, that is to say, on the said 31st day of January, forasmuch as it appears to the Court here that the trial of the said issues, so joined as aforesaid, is not, nor can the said trial thereof be concluded on this same day, it is ordered by the said Court here that the said jurors so impanelled and sworn to try the said issues, shall

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have leave to withdraw this same day from the Bar of this Court here, and that the said jurors shall again come to the Bar of this same Court here on the morrow, that is to say, on the 1st day of February next, at the hour of 10 o'clock in the forenoon ; and that the said defendants do again appear at the Bar of this Court at that time, in order that the said trial may be continued." On the 1st of February this continuance was entered : " And now at this day, that is to say, on the said 1st day of February, at the hour aforesaid, the said *Attorney-General* for our said lady the Queen comes into Court here, and the said defendants appear at the Bar of the said Court here, as in that behalf directed aforesaid. And the said jurors so impanelled and sworn aforesaid also come, and the said trial of the said issues is thereupon continued for a certain time, the same being necessary for the purpose thereof, that is to say, until and upon Monday, 12th February, A.D. 1844."

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On Monday, 12th February, the jurors delivered in the following findings: The jurors say, that as to the premises in the said first and second counts of the said indictment respectively charged as aforesaid, the said Daniel O'Connell, John O'Connell, Thomas Steele, Thomas Matthew Ray, Charles Gavan Duffy, *the Rev. Thomas Tierney, John Gray, and Richard Barrett, are and each of them is guilty of so much thereof as charges them for that they, unlawfully, maliciously, and seditiously contriving, intending, and devising to raise and create discontent and disaffection amongst the liege subjects of our said lady the Queen, and to excite the said liege subjects to hatred and contempt of the Government and Constitution of this realm as by law established, and to excite hatred, jealousies, and ill-will amongst different classes of the said subjects, did unlawfully, maliciously, and seditiously combine, conspire, confederate, and agree with each other, and with divers other persons whose names are to the jurors unknown, to raise and create discontent and disaffection amongst the liege subjects of our said lady the Queen, and to excite such subjects to hatred and contempt of the Government and Constitution of this realm as by law established, and to unlawful and seditious opposition to the said Government and Constitution, and also to stir up jealousies, hatred, and ill-will between different classes of her Majesty's subjects, and especially to promote amongst her Majesty's subjects in Ireland feelings of ill-will and hostility towards and against her Majesty's subjects in the other parts of Great Britain and Ireland, and especially in that part of the said United Kingdom called England,

in the said first and second counts of the said indictment respectively charged as aforesaid, in manner and form as therein is so above charged as aforesaid; and as to the residue of the said premises in the said first and second counts of the said indictment respectively charged as aforesaid, the said jurors upon their oath aforesaid say that the said Thomas Tierney is not guilty thereof. The jurors say that Daniel O'Connell, John O'Connell, Thomas Steele, Thomas M. Ray, Charles Gavan *Duffy, John Gray, and Richard Barrett, are and each of them is guilty of so much of the said residue as charges them for that they, unlawfully, maliciously, and seditiously intending as aforesaid, and further unlawfully, maliciously, and seditiously contriving, intending, and devising to bring into disrepute, and to diminish the confidence of her Majesty's subjects in the tribunals duly and lawfully constituted for the administration of justice, and further contriving, intending, and devising, by means of intimidation and the demonstration of great physical force, to procure and effect changes to be made in the Government, laws, and Constitution of this realm as by law established, did unlawfully, maliciously, and seditiously combine, conspire, confederate, and agree with each other and with divers other persons whose names are to the jurors unknown, to cause and procure divers subjects of the Queen to meet and assemble together in large numbers, at various times and in different places within Ireland, for the unlawful and seditious purpose of obtaining, by means of the intimidation to be thereby caused, and by means of the exhibition and demonstration of great physical force at such assemblies and meetings, changes and alterations in the Government, laws, and Constitution of this realm as by law established; and further to bring into hatred and disrepute the Courts by law established in Ireland for the administration of justice, and to diminish the confidence of her said Majesty's liege subjects in Ireland in the administration of the law therein, with the intent to induce her Majesty's subjects to withdraw the adjudication of their differences with and claims upon each other from the cognizance of the said Courts by law established, and to submit the same to the judgment and determination of other tribunals, to be constituted and contrived for that purpose, *in the said residue of the said first and second counts of the said indictment respectively charged as aforesaid, in manner and form as therein is so above charged; and as to the remainder of the said residue of the said premises in the said first and second counts of the said indictment respectively

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therein charged as aforesaid, the jurors say, that John O'Connell, Thomas Steele, Thomas M. Ray, and John Gray, are not nor is any of them guilty thereof. And the jurors further say, that Daniel O'Connell, Richard Barrett, and Charles Gavan Duffy, are and each of them is guilty of so much of the said remainder of the said residue as charges them for that they, unlawfully, maliciously, and seditiously intending to create discontent and disaffection amongst divers of the said subjects, and amongst others her Majesty's subjects serving in her Majesty's army, did unlawfully combine and conspire with each other, and with divers other persons whose names are to the jurors unknown, to excite discontent and disaffection amongst divers of her Majesty's subjects serving in her Majesty's army, in the said remainder of the said residue so charged as aforesaid, in manner and form as therein is so above charged : and as to other the premises in the said remainder of the said residue charged as aforesaid, the jurors further say, that Daniel O'Connell, Richard Barrett, and Charles G. Duffy, are not, nor is any of them, guilty thereof. And as to the premises in the third count of the indictment so charged as aforesaid, the jurors say that Daniel O'Connell, Richard Barrett, and Charles Gavan Duffy, are, and each of them is, guilty thereof in manner and form as therein in that behalf against them, Daniel O'Connell, Richard Barrett, and Charles Gavan Duffy, charged as aforesaid. And the

[*174] jurors further say, that John O'Connell, Thomas Steele, *Thomas Matthew Ray, and John Gray, are, and each of them is, guilty of the premises in the third count of the indictment charged against them, John O'Connell, Thomas Steele, Thomas M. Ray, and John Gray, in manner and form as therein is so above charged against them as aforesaid, save and except as to so much of the premises in the third count as charges them, the said John O'Connell, Thomas Steele, T. M. Ray, and John Gray, with the unlawfully, maliciously, and seditiously conspiring to excite discontent and disaffection amongst divers of her Majesty's subjects serving in her said Majesty's army ; and as to the last-mentioned part of the premises in the third count of the indictment, and so excepted as last aforesaid, the jurors say that they, John O'Connell, Thomas Steele, Thomas M. Ray, and John Gray, are not, nor is any of them, guilty thereof. And the jurors further say, that Thomas Tierney is guilty of so much of the premises in the said third count as charges him, for that he, unlawfully, maliciously, and seditiously contriving, intending, and devising to raise discontent

and disaffection amongst the liege subjects of the Queen, and to excite the liege subjects to hatred and contempt of the Government and Constitution of this realm as by law established, and to excite hatred, jealousies, and ill-will amongst different classes of the subjects, did unlawfully, maliciously and seditiously conspire, &c. with Daniel O'Connell, Richard Barrett, Charles Gavan Duffy, John O'Connell, Thomas Steele, Thomas M. Ray, and John Gray, and divers other persons unknown, to raise and create discontent and disaffection amongst the liege subjects of the Queen, and to excite such subjects to hatred and contempt of the Government and Constitution of this realm as by law established, and to unlawful and seditious *opposition to the Government and Constitution, and also to stir up hatred, jealousies, and ill-will between different classes of her Majesty's subjects, and especially to promote amongst her Majesty's subjects in Ireland feelings of ill-will and hostility towards and against her Majesty's subjects in other parts of the United Kingdom, and especially in England, in the third count of the said indictment above charged against him Thomas Tierney, in manner and form as therein is so above charged against him ; and as to the residue of the premises in the third count of the said indictment against him Thomas Tierney so charged, the jurors say that the said Thomas Tierney is not guilty thereof. And as to the premises in the fourth count of the indictment so charged as aforesaid, the jurors say that they, Daniel O'Connell, Richard Barrett, Charles Gavan Duffy, John O'Connell, Thomas Steele, T. M. Ray, and John Gray, are, and each of them is, guilty thereof, in manner and form as therein in that behalf is charged against them as aforesaid ; and the jurors further say that Thomas Tierney is guilty of so much of the premises in the fourth count as charges him Thomas Tierney, for that he, unlawfully, maliciously and seditiously contriving, intending, and devising to raise and create discontent and disaffection amongst the liege subjects of the Queen, and to excite them to hatred and contempt of the Government and Constitution of this realm as by law established, and to excite jealousies and ill-will amongst different classes of the said subjects, did unlawfully, maliciously, and seditiously conspire, &c., with Daniel O'Connell, Richard Barrett, Charles Gavan Duffy, John O'Connell, Thomas Steele, Thomas Matthew Ray, and John Gray, and divers other persons unknown, to raise and create discontent and disaffection amongst *the liege subjects of the Queen, and to excite such subjects to hatred and contempt of the Government

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and Constitution of this realm as by law established, and to unlawful and seditious opposition to the said Government and Constitution, and also to stir up hatred, jealousies and ill-will between different classes of her Majesty's subjects, and especially to promote amongst her Majesty's subjects in Ireland feelings of ill-will and hostility towards and against her Majesty's subjects in other parts of the said United Kingdom, and especially in England, in the 4th count of the indictment above charged against him Thomas Tierney, in manner and form as therein is so above charged against him. And as to the residue of the premises in the 4th count of the said indictment against him Thomas Tierney so charged as aforesaid, the jurors say that he is not guilty thereof. And as to the premises in said 5th count of the said indictment so charged as aforesaid, the said jurors upon their oath say as aforesaid, that Daniel O'Connell, John O'Connell, Thomas Steele, Thomas Matthew Ray, Charles Gavan Duffy, John Gray, Richard Barrett, Thomas Tierney, are, and each of them is, guilty thereof, in manner and form as therein is so above charged against them. And as to the premises in the several other counts of the indictment, so therein respectively charged as aforesaid, that is to say, the 6th, 7th, 8th, 9th, 10th, and 11th counts respectively, the jurors say that they, Daniel O'Connell, John O'Connell, Thomas Steele, Thomas Matthew Ray, Charles Gavan Duffy, John Gray, and Richard Barrett, are, and each of them is, guilty thereof in manner and form as therein so above charged against them as aforesaid. And the jurors further and lastly say, that Thomas Tierney is not guilty of the premises in the last-mentioned counts of the indictment, that *is to say, the 6th, 7th, 8th, 9th, 10th, and 11th counts thereof, in manner and form as therein against him Thomas Tierney so above charged as aforesaid. No finding was returned as to the defendant Peter James Tyrrell, who had died after the bill was found.

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On Monday, April 15th, the appearance of the defendants was entered on the record, and the case was continued to the first day of Trinity Term, and thence again to the 30th May in the said Term.

Upon Thursday, the 19th of April, in Easter Term, a motion was made in the Court on behalf of each of the defendants for a new trial, on the ground, amongst others, of the admission of illegal evidence against the defendants respectively, and, being opposed by the *Attorney-General*, was by the Court refused; but

Mr. Justice PERRIN dissented from the decision of the Court hereon, and Mr. Justice CRAMPTON expressed his concurrence with the opinion of Mr. Justice PERRIN on the case, so far as it affected the Rev. T. Tierney. The *Attorney-General* afterwards entered a *nolle prosequi* as to that defendant.

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Upon Monday, the 27th of May, a motion in arrest of judgment was made on behalf of all the remaining defendants, but was opposed by the *Attorney-General*, and refused by the Court.

The defendants afterwards severally sued forth writs of error, *coram nobis*, and, with the exception of the defendant T. Steele, respectively assigned for error in fact, that the bill of indictment was found a true bill upon the evidence of certain witnesses for the Crown, who were produced before and examined by the grand jury, but who were not sworn or affirmed, and did not make solemn declaration, according to the statute in that case made and provided, in open Court, before being so examined by the said grand jury, as by the statute 56 Geo. III. c. 87, is required. The defendant T. Steele, on his part, assigned for error in fact, that the indictment was not found and returned a true bill pursuant to the provisions of the statute 1 & 2 Vict. c. 87, inasmuch as that, in stating the names of the witnesses so produced and examined, and whose names were indorsed on the bill of indictment sent before the grand jury, neither the foreman nor any other member of the grand jury, by his initials or signature, as is required by the last-mentioned statute, did authenticate the fact, that the witnesses or any of them had been sworn or had made affirmation or declaration as aforesaid, nor state that no other witness or witnesses, save those named as aforesaid, was or were examined by or before the said grand jury.

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The *Attorney-General* having pleaded *in nullo est erratum* in each case, issue was joined thereon, and the judgments were, after argument thereupon, respectively affirmed.

The defendants then brought writs of error in Parliament (1).

(1) The defendants assigned the following reasons for the reversal of the judgment :

1st and 2nd. Because the indictment was not found a true bill according to the provisions of the statute 56 Geo. III. c. 87, inasmuch as the witnesses examined before the grand jury, and upon whose evidence the said indictment was found, were not,

nor was any of them, sworn in open Court; by reason whereof the indictment was in effect found upon the evidence of unsworn witnesses.

3rd. Because judgment ought to have been given for the defendants below, upon their respective pleas in abatement.

4th. Because there is not disclosed with sufficient certainty in the said

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The case came on for argument on *Thursday, July 4th, when the Lord Chancellor, Lord Brougham, Lord Denman, Lord

indictment, or in any of the counts thereof, an agreement to commit an indictable offence.

5th. Because the charge contained in the first five counts of the indictment, is a charge of too general and vague a nature to warrant or sustain any conviction or judgment thereon.

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6th. Because, even supposing the said charge is sufficient in substance, yet the same is not stated or set forth in the indictment *upon which the plaintiffs in error have been convicted, with the certainty which the law requires in such cases.

7th, 8th, 9th, 10th, 11th, 12th, 13th, and 14th. These reasons stated at full length the details of the objection taken in the 5th reason.

15th. Because the trial in this case was not fairly or justly had, and was also illegally had, inasmuch as the jurors who tried the same were selected and struck from a list of special jurors for the county of the city of Dublin, which had been fraudulently and illegally made and contrived for the purpose of prejudicing the defendants in their trial, and which was not constituted or framed pursuant to the provisions of the statute 3 & 4 Will. IV. cap. 91.

16th. Because judgment ought to have been given for the said defendants in error on the demurrers to their respective challenges to the array of the said panel.

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17th, 18th, 19th, and 20th. Because the said trial was not duly or regularly had, inasmuch as the same was a trial at Bar, which was commenced in Term, and was continued into and concluded in the vacation after Term; and there was no authority by law for continuing the trial out of Term, nor was there any proper continuance from the time when the verdict was given, to the following Term, when judgment was pronounced.

21st. Because the judgment has been and is given against the respective defendants for their supposed

"offences aforesaid," whereas they have respectively been found guilty of a greater number of offences than they could by law be found guilty of under the said indictment; and especially because D. O'Connell, R. Barrett, and C. G. Duffy, have, and each of them has, been found guilty, under each of the first and second counts of the indictment, of three conspiracies and offences; and J. O'Connell, T. Steele, T. M. Ray, and J. Gray, have respectively been and are, and each of them has been and is, found guilty, under each of the first and second counts of the indictment, of two conspiracies and offences; and because D. O'Connell, J. O'Connell, T. Steele, T. M. Ray, C. G. Duffy, J. Gray, R. Barrett, and T. Tierney, having been found guilty, under each of the first and second counts of the indictment, of conspiring with each other, could not, nor could any or either of them, be found guilty under the said first and second counts of the indictment, or either of them, of any further or other conspiracy or offence in which T. Tierney was not concerned, or of which he was not guilty, or any other conspiracy or offence whatsoever.

22nd. Because each of the said first and second counts of the indictment charges each of them, D. O'Connell, J. O'Connell, T. Steele, T. M. Ray, C. G. Duffy, J. Gray, R. Barrett, T. Tierney, and P. J. Tyrrell, either with one offence only, or with separate and distinct offences; and because, if each or either of those counts charges the said last-named persons with a greater number of offences than one, then such count is bad for duplicity; *and if each of the said counts charges each of the said parties with one offence only, neither of the said parties could be legally found guilty under such count of more than one offence; whereas D. O'Connell, C. G. Duffy, and R. Barrett, have been respectively found guilty, under each of the said first and second counts of the indictment,

Cottenham, and Lord *Campbell, with other Lords, were present. The Judges had been summoned, and Lord Chief Justice Tindal,

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of three distinct conspiracies and offences; and J. O'Connell, T. Steele, T. M. Ray, and J. Gray, have and each of them has been found guilty of two distinct conspiracies and offences under each of the said first and second counts of the indictment; and judgment has been given against D. O'Connell, C. G. Duffy, R. Barrett, J. O'Connell, T. Steele, T. M. Ray, and J. Gray, for the said offences.

23rd. Because by the said verdict or finding upon the third count of the indictment, the jurors have found that D. O'Connell, R. Barrett, and C. G. Duffy, are, and each of them is, guilty of the premises in that count charged, which is ambiguous in this, that it does not find whether D. O'Connell, R. Barrett, and C. G. Duffy, were or are guilty of conspiring with each other as in that count is mentioned, or of conspiring with J. O'Connell, T. Steele, T. M. Ray, T. Tierney, P. J. Tyrrell, J. Gray, and divers other persons to the jurors unknown, or any or either and which of them; and because, if the finding of the jurors is to be considered as a finding that D. O'Connell, R. Barrett, and C. G. Duffy, were or are, or that each of them was and is, guilty of conspiring with J. O'Connell, T. Steele, T. M. Ray, T. Tierney, P. J. Tyrrell, J. Gray, and divers other persons to the jurors unknown, the said verdict or finding is void for repugnancy. (The nature of the alleged repugnancy, as afterwards insisted on in the argument, was fully set out.)

24th. Because the finding of the jurors upon the fourth, sixth, and subsequent counts of the indictment, are in like manner void for ambiguity, repugnancy, argumentativeness, and for not finding upon the whole matters in issue upon the said last-mentioned counts respectively, and for finding divers of the parties charged by the indictment guilty of a greater number of offences than is charged against them by the said indictment.

25th. Because the defendants have been found guilty, under the first three counts of the said indictment, of a part only of the said counts respectively; whereas by the law of the realm they should respectively have been either altogether convicted or acquitted of the whole of the several matters charged in and by the said counts respectively, inasmuch as the charges therein respectively contained were not, and are not, divisible, and were not, and are not, of a nature to warrant a partial conviction thereon.

26th. Because the judgment is void for ambiguity and uncertainty, and could not be pleaded in bar to any new indictment for the same offences.

27th. Because the verdict or finding in this case, being, for these reasons, ambiguous, repugnant, &c., cannot sustain or warrant the *judgments given thereon; and even if said verdict was sufficient upon certain of the counts of the indictment, yet inasmuch as the judgments are respectively founded upon the entire verdict, and not upon particular counts of the indictment, or the finding returned upon such counts only, the judgments being respectively bad in part, are bad in the whole, and altogether void.

28th. Because there is no sufficient judgment in respect of any of the defendants, nor is there any sufficient entry of the said respective judgments upon the record, as there does not appear to have been any interlocutory judgment pronounced or entered against any of the defendants; whereas, by the law and custom of the realm, in every case of a conviction upon an indictment in the Court of Queen's Bench, where sentence of imprisonment may be given, an interlocutory judgment of *Quod capiatur* should be pronounced or entered, to bring up the defendant to hear final judgment; and this not having been done in this case, the defendants were not duly or regularly brought into Court to receive judgment, and therefore

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*Mr. Justice Patteson, Mr. Justice Williams, Mr. Justice Coleridge, Mr. Justice Coltman, Mr. Justice Maule, *Mr. Baron Parke, Mr. Baron Alderson, and Mr. Baron Gurney, accordingly attended.

Sir T. Wilde, Mr. M. D. Hill, Mr. Kelly, Mr. Serjeant Murphy, Mr. Crompton, Mr. David Leahy, Mr. J. W. Smith, Mr. Close, Mr. Peacock, and Sir Coleman O'Loughlin, appeared as counsel for the plaintiffs in error.

The *Attorney-General*, the *Solicitor-General*, the *Attorney-General for Ireland*, Mr. Waddington, Mr. Napier, and Mr. Smyly, appeared for the Crown.

Sir T. Wilde, at the desire of the LORD CHANCELLOR, stated the course proposed to be pursued. He said :

I appear for Mr. Daniel O'Connell; *Mr. Peacock* is with me. The defendants throughout the indictment have defended separately; they have brought separate writs of error. The points on which they mean to rely are different from each other. With a view to the convenience of the House, we have proposed a certain arrangement in our mode of proceeding. We propose that *Mr. Peacock* and myself should be heard for Mr.

the final judgment pronounced was and is for that reason irregular and void and contrary to law, as being thereby rendered in effect a judgment or imprisonment to commence *in futuro*.

29th and 30th. Because the judgment given in this case as to each of the defendants is illegal, as there was no authority in law to warrant the Court below in adjudging that the defendants should respectively or at all enter into and give such recognizances as are in the said judgments mentioned. And even supposing that the Court had such authority, yet the judgments are illegal for uncertainty, as it does not appear when such recognizances were to be entered into and given.

31st. Because the award of execution in this case, as to each of the defendants, was and is erroneous and illegal, as there was no judgment given by the Court to warrant or authorize the order that the sheriff

should deliver the said defendants respectively into the custody of the keeper of the prison in said order mentioned, to be kept in custody as therein mentioned until they should have paid their several fines, and entered into the several recognizances thereby required.

32nd and 33rd. Because the award of execution is also erroneous for uncertainty and ambiguity, as it does not thereby sufficiently appear whether each of the said defendants is to be imprisoned for his respective term of imprisonment only, or for such term and until he or each and all of the defendants shall have paid the fines and entered into the recognizances required; and the period of imprisonment of each of the defendants is rendered not only uncertain, but dependent and conditional upon acts and things to be done by the others of the defendants.

The 34th reason was a general statement of error in the proceedings.

Daniel O'Connell ; that two other counsel shall be heard for the remaining parties ; that is, that *Mr. Hill* shall be heard for *Mr. Steele*, and *Mr. Kelly* for all the other defendants. We have also, with a view to the convenience of the House, arranged that we shall not all address your Lordships on the same points. There are various important questions brought before the House by these writs of error. Some are applicable to some of the plaintiffs in error ; some to others : and we propose that certain of us shall address your Lordships on certain points only.

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THE LORD CHANCELLOR :

There is another point material for consideration. How do you propose to *arrange about the replies ; do you propose that there shall be one reply for all ?

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Sir T. Wilde :

No, my Lord ; we propose that there shall be three replies. Of course we shall bear in mind that the circuits are close at hand ; and so far as is consistent with justice, we shall act upon that knowledge. It has been with a view to that, I suggested the course of not having the same points argued by all of us ; but I am afraid that it will not be practicable for me alone to reply for all.

The Attorney-General :

I do not like to interfere in any manner with any course which may appear convenient ; but I do not quite understand how my learned friend can say that all these parties appear separately, by three counsel, and can claim to have three replies.

THE LORD CHANCELLOR :

What we have now to consider is this, that in strictness, as all these defences are separate, the defendants are entitled to be represented by different counsel. They are, therefore, entitled, in strictness, to be heard by seven counsel, if they please.

The Attorney-General :

I doubt whether the bringing of seven writs of error is in itself a regular course.

LORD CAMPBELL :

I have not the smallest doubt, that where there are seven parties

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in a case of this sort, each has a right to be heard by himself or his counsel. A contrary practice might lead to great injustice, in several supposable cases. In a case like this, *a man is not to be bound by the arguments of counsel whom he never selected to represent his interest.

The Attorney-General :

The ordinary rule is, that the Crown should have the reply. What I want is, that in this case that may not be done which would be irregular, and yet would be drawn into precedent. What is now proposed does not seem to me in conformity with your Lordships' practice. Where there is an indictment against several defendants, the usual course is that there should not be separate writs of error. If one party brings a writ of error, he can call on the others to join in the writ or not. When therefore parties take the course of bringing seven writs of error on the same record, for the purpose of being heard by different counsel, where the points of law are the same, they cannot be heard in that manner. I doubt whether these parties can have a writ of error in this form. I do not want to make any technical objection; but certainly this is not the usual mode of proceeding.

Sir T. Wilde :

As the defendants would have a right to be heard in person if they were all present, and possessed legal knowledge to put their cases properly before the House, they may be heard by their different counsel. They have separated in their defences: they have brought separate writs of error: they ought to be heard separately upon them. It might be productive of serious consequences if they were obliged to confide in counsel whom they had not selected. Their interests are separate; the imprisonment to which they have been sentenced must be separately suffered by each.

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The Attorney-General :

I am not objecting to their appearing by as many counsel as they may think fit. What I want to call your Lordships' attention to, is the regularity of proceeding with regard to the reply. I believe that the practice always is for the Crown to have the reply. I state this in the first instance to the House that no one may be taken by surprise, and that the House may deal with the matter as it thinks fit. At least, there ought not to be three replies on the

other side ; or if there are three replies, they are to be regulated in the same spirit as the arrangement already mentioned to the House, namely, that different counsel should address themselves to different points. I submit this to your Lordships' consideration; but, first, I ask your Lordships' judgment as to the right to reply itself.

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LORD CAMPBELL :

In the case of an appeal against a decree of the Court of Session, where the revenue was concerned, the counsel for the plaintiff in error had the reply (1). A similar course was adopted in *Frost's* case, when I was Attorney-General; and I well remember that the present LORD CHIEF BARON, who was one of the counsel for the prisoner, had the reply (2).

THE LORD CHANCELLOR :

It is not necessary to decide that point now. As the case at present stands, *Sir T. Wilde* says that each of the three counsel for the plaintiffs in error claims to reply; but it is suggested by the *Attorney-General* that the course proposed as *to the opening should be applicable to this reply, and that each of the counsel should confine himself to particular points.

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Sir T. Wilde :

I do not mean to say anything that could deprive Mr. O'Connell of the benefit of my reply on all the points of the case, even those which are not included in the first argument I propose to address to your Lordships.

THE LORD CHANCELLOR :

It may be the understanding at present that no one will, in his reply, touch on the points argued by the counsel who preceded him; without absolutely binding you to such an arrangement.

The learned counsel then addressed the House for Mr. O'Connell

(1) *Lord Douglas v. The Officers of State in Scotland*, 9 Cl. & Fin. 174; and see *Drake v. The Attorney-General*, 52 R. R. 131 (10 Cl. & Fin. 257).

(2) See *Reg. v. Frost*, 9 Car. & P. 165, in which the Judges, sitting in the Exchequer Chamber, held that in

a case of high treason, where a point was reserved for the opinion of the fifteen Judges, counsel were heard as *amici Curie*. *Sir F. Pollock*, on the part of *Frost*, was then allowed to reply to the arguments of the *Attorney-General*.

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and the other defendants. Their arguments on the different points were to the following effect :

As to the challenge to the array, there are now two Acts for the regulation of juries in Ireland: the 3 & 4 Will. IV. c. 91, and 4 & 5 Will. IV. c. 8. The 4th section of the former, and the 2nd section of the latter statute, apply to this point. The provisions of these statutes have not been observed; one important list of names that ought to have constituted part of the jury-book, has been lost. * * *

[180] The next point is as to the swearing of the witnesses. It appears on the plea in abatement, and on the assignment of errors in fact, that the witnesses, either do not appear to have been sworn or affirmed at all, or if they were, the act was not performed in Court, as required by the statute. * * *

[194] The next point is that which relates to the form of the indictment. A general form of indictment like this has always been considered as improper; it prevents a good defence at first, and a chance of appeal afterwards. What is it that constitutes a conspiracy? not merely a combination of persons for a common purpose, for that purpose may be legal. In political matters especially, no change of laws or public policy can be effected but by the combined labours of several individuals. * * *

[197] In addition to the general objection to the form of the indictment, another arises upon the defectiveness of some of the counts in it. It is submitted that there are several bad counts in this indictment, but two of them are most obviously so. These are the *6th and the 8th. The 6th count contains the charge of the "demonstration of physical force," and thereby causing "intimidation;" the 8th count, the withdrawing of causes from the ordinary tribunals of the country. As to the first of these two counts, it is bad for uncertainty. * * *

[199] Then as to the 8th count. The substance of that count is a charge of an endeavour to bring certain tribunals into hatred and contempt. What tribunals? It does not mean all the tribunals of the country. Is it illegal in a free country, if a tribunal is believed to be mischievous, to endeavour to bring it into hatred *and contempt, with a view to its being changed? No authority has yet decided that such is the law. Had it been so decided, there would have been no chance of our adopting those amendments which experience is constantly suggesting; and the Star Chamber itself might have flourished at this day. * * *

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Then, the verdict is bad in many respects. The verdict on the first count amounts to a finding of three of the defendants "guilty of the premises;" that is, of conspiring with the other five defendants to accomplish the purposes charged in that count, while it finds the other five not guilty of conspiring with them: this finding is contradictory, repugnant, and absurd. The finding that the defendants have been guilty of the premises, is impossible and absurd in this case. * * *

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The judgment itself is defective in form as well as substance, and the House has no power to amend it, but must reverse it. * * *

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Then assuming the judgment to be a general judgment on an indictment containing bad as well as good counts, it is submitted that it cannot be supported. The same rule which applies in civil, is applicable also in criminal cases. A general judgment on an indictment where some of the counts are bad, is like a general verdict on a declaration where some of the counts are bad: it cannot be supported. * * *

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The judgment here is bad in another respect; it contains no entry of acquittal, though the finding shows some defendants were pronounced not guilty upon parts of the indictment; this renders it void: Viner's Abridgment (1). * * *

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The last point is, that the judgment is bad, as it orders the defendants to enter into recognizances to "keep the peace and for good behaviour for the space of seven years next ensuing the acknowledgment thereof." It was formerly doubted whether the Courts could, as part of a sentence, direct parties to enter into recognizances to keep the peace. That question was considered before this House on error, in *Rex v. Hart and White* (2), and the right to do so "for a reasonable time" was affirmed. But the order here is bad in itself; the term fixed here is not reasonable. It is a fixed period of seven years from the date of the acknowledgment of the recognizances; so that a defendant, unable to obtain sureties, might be imprisoned for his whole life. The date ought to have been fixed at the commencement or at the termination of the imprisonment; and then, if the sureties were not obtained, as the imprisonment of the party during the time for which the recognizances were required would answer the same end, he would be relieved from further confinement. All the precedents are in that form.

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(1) Error (B. b) pl. 18.

(2) 3 St. Tr. 1344.

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The *Attorney-General*, and the *Attorney-General for Ireland* (with whom were the *Solicitor-General*, Mr. *Waddington*, Mr. *Napier*, and Mr. *Smyly*), appeared for the Crown, and argued to this effect :

The main proposition on the other side is, that where, in a criminal case, there is a general judgment on an indictment, some counts in which are good and some bad, the judgment must be reversed. This rule is said to apply more particularly where the punishment is discretionary, and much argument has been employed to show the hardship that may result to defendants if such should not be established as the rule of practice which is to govern criminal proceedings. The rule in civil proceedings has been referred to, but that furnishes no analogy in favour of the proposition put forward for the defendants. * * *

[218] As to the supposed confusion between the charges in the counts and the findings on them, it is submitted that there is none. The findings declare the opinion of the jury that all the defendants have been guilty of entering into the general conspiracy, but some of them committed some of the particular acts charged, and some committed others, these acts being each and all directed to effect the common objects contemplated by these persons in entering into the general conspiracy. It cannot be said that finding one man guilty of some of these acts, the same man and another of some others, and a third of all put together, is a finding of three conspiracies. Each separate act is not a separate conspiracy, and therefore a finding of each act is not a finding of so many separate conspiracies. * * *

[224] As to the swearing of the witnesses, the defendants put in a plea in abatement upon this point. That plea is defective. It alleges that the witnesses were not sworn. That is not a conclusive objection ; they might have been affirmed, and it is not alleged that they were not affirmed. * * *

[227] As to the form of the indictment : The counts are good, and the offences well laid. * * *

[229] Then as to the form of the sentence, so far as relates to giving the recognizances : There is no error in this respect. The defendants may enter into the recognizances at any time they please, and the recognizances will run for that time. The law may impose upon any individual such a condition as that of giving sureties to keep the peace, without any intendment arising that he should be kept in prison for life. * * *

To sum up, therefore, the arguments on these objections, it may be said, that even if one count should be bad, that will not vitiate the whole proceedings. But all the counts are good; they state acts which are offences in law, for they charge unlawful combinations to effect purposes which, in some instances, are themselves unlawful, and which in all are proposed to be effected by means that are unlawful. * * The challenge to the array cannot be supported. The verdict is not vitiated by there being surplus findings returned by the jury, for these findings may be rejected by the Court. Every one of the defendants being convicted of some part of the charges against him, an entry of acquittal as to him, because he was not found guilty of the remaining charges, would have been erroneous. There is nothing to justify the Court in saying that the witnesses were not sworn, or that the judgment is given on any bad counts, or that the recognizances have been improperly ordered. The judgment of the Court below is warranted by the record and by the verdict, and must therefore be affirmed.

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Sir T. Wilde, Mr. Kelly, and Mr. Hill, were severally heard in reply (1).

The *Attorney-General* did not wish in this case to insist on his right to reply; the more especially as no authorities had been cited for the first time, in the arguments just concluded: but on the part of the Crown, he protested against what was now done being drawn into a precedent. He was not aware of any criminal case in which the course now adopted had been permitted.

LORD CAMPBELL :

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There is a case of *Lord Dunglas v. The Officers of State* (2), where the Crown was directly concerned, and yet the appellant had the reply.

The *Attorney-General* :

That is not a criminal case, and cannot therefore be a direct precedent. The counsel for the Crown do not abandon the right to a final reply, but merely waive it in this instance.

The LORD CHANCELLOR stated that he had prepared certain

(1) See *ante*, p. 78 *et seq.*

Drake v. The Attorney-General, 52 R. R.

(2) 9 Cl. & Fin. 173, 199; see also 131 (10 Cl. & Fin. 257).

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questions to be submitted for the consideration of the Judges. His Lordship read them as follows :

The following were the questions put to the Judges :

1. "Are all or any, and if any, which, of the counts in the indictment bad in law ; so that if such count or counts stood alone in the indictment, no judgment against the defendants could properly be entered up on them ?

2. "Is there any, and if any, what, defect in the findings of the jury upon the trial of the said indictment, or in the entering of such findings ?

3. "Is there any sufficient ground for reversing the judgment, by reason of any defect in the indictment, or of the findings, or entering of the findings, of the jury upon the said indictment ?

4. "Is there any sufficient ground to reverse the judgment, by reason of the matters stated in the pleas in abatement or any of them, or the judgments upon such pleas ?

5. "Is there any sufficient ground for reversing the judgment, on account of the continuing the trial in the vacation, or of the order of the Court for that purpose ?

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6. "Is there any sufficient ground for reversing the judgment on account of the judgments of the Court overruling and disallowing the challenges to the array, or any or either of them, or of the matters stated in such challenges ?

7. "Is there sufficient ground to reverse the judgment, by reason of any defect in the entry of continuances from the said trial to the said 15th day of April, regard also being had to the appearance of the defendants on the said last-mentioned day ?

8. "Is there any sufficient ground to reverse or vary the judgment on account of the sentences, or any or either of them, passed on the respective defendants, regard being had particularly to the recognizances required, and to the period of imprisonment dependent upon the entering into such recognizances ?

9. "Is there any sufficient ground to reverse the judgment on account of the judgments on the assignments of error *coram nobis*, or any or either of them, or of the matters stated in such assignments of error, or any or either of them ?

10. "Is there any sufficient ground for reversing the judgment by reason of its not containing any entry as to the verdicts of acquittal ?

11. "In an indictment consisting of counts A., B., C., where the verdict is guilty of all generally, and the counts A. and B. are

good, and the count C. is bad; the judgment being that the defendant for the offences aforesaid be fined and imprisoned; which judgment would be sufficient in point of law if confined expressly to counts A. and B.; can such judgment be reversed on a writ of error? Will it make any difference whether the punishment be discretionary as above suggested, or a punishment fixed by law?"

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The Judges requiring time to answer these questions until after their circuits, which were appointed to commence the next day; the further consideration of the case was adjourned to the 2nd of September.

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TINDAL, Ch. J. :

My Lords, the answer to the first question will depend upon the consideration, whether all the counts of the indictment are framed with that proper and convenient certainty, with respect to the substance of the charge of conspiracy, which the law requires: for, undoubtedly, if any of such counts are framed in so loose, uncertain, or inapt a manner, so that the defendants might have availed themselves of the insufficiency of the indictment upon a demurrer, there is nothing to prevent them from having the same advantage of the objection upon a writ of error. The crime of conspiracy is complete if two, or more than two, should agree to do an illegal thing; that is, to effect something in itself unlawful, or to effect, by unlawful means, something which in itself may be indifferent or even lawful. That it was an offence known to the common law, and not first created by the statute 38 Edw. I., is manifest. That statute speaks of conspiracy as a term at that time well known to the law, and professes only to be "a definition of conspirators." It has accordingly been always held to be the law, that the gist of the offence of conspiracy, is the bare engagement and association to break the law, whether any act be done in pursuance thereof by the conspirators or not: *Reg. v. Best* and others (1), and *Rex v. Edwards* and others (2). No serious objection appears to have been made at your Lordships' Bar *against the sufficiency of any of the counts prior to the sixth. Indeed there can be no question but that the charges contained in the first five counts do amount, in each, to the legal offence of conspiracy, and are sufficiently described therein. There can be no doubt but that the agreeing of divers persons together to raise discontent and disaffection amongst the

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(1) Salk. 174.

(2) 8 Mod. 320.

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liege subjects of the Queen; to stir up jealousies, hatred, and ill-will between different classes of her Majesty's subjects; and especially to promote amongst her Majesty's subjects in Ireland, feelings of ill-will and hostility towards her Majesty's subjects in the other parts of the United Kingdom, and especially in England; which charges are found in each of the five counts which first occur in the indictment,—do form a distinct and definite charge in each, against the several defendants, of an agreement between them to do an illegal act; and it therefore becomes unnecessary to consider the other additional objects and purposes alleged in some of those respective counts to have been comprised within the scope of the agreement of the several defendants.

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With respect, however, to the sixth and seventh counts, in the form in which they stand upon this record, we all concur in opinion, that they do not state the illegal purpose and design of the agreement entered into between the defendants, with such proper and sufficient certainty, as to lead to the necessary conclusion that it was an agreement to do an act in violation of the law. Each of those two counts does, in substance, state the agreement of the defendants to have been “to cause and procure divers subjects to meet together in large numbers, for the unlawful and seditious purpose of obtaining, by means of the intimidation to be thereby caused, and by means of the *exhibition and demonstration of great physical force at such meetings, changes in the Government, laws, and Constitution of the realm.” Now, though it may be inferred from this statement, that the object of the defendants was probably illegal, yet it does not appear to us to be so alleged with sufficient certainty. The word “intimidation” is not a technical word; it is not *vocabulum artis*, having a necessary meaning in a bad sense; it is a word in common use, employed on this occasion in its popular sense; and in order to give it any force, it ought at least to appear from the context what species of fear was intended, or upon whom such fear was intended to operate. But these counts contain no intimation whatever upon what persons this intimidation was intended to operate: it is left in complete uncertainty, whether the intimidation was directed against the peaceable inhabitants of the surrounding places; against the subjects of the Queen dwelling in Ireland, in general; against persons in the exercise of public authority there; or even against the Legislature of the realm. Again, the mere allegation that these changes were to be obtained by the exhibition and demonstration of physical force, without any

allegation that such force was to be used, or threatened to be used, seems to us to mean no more than the mere display of numbers, and consequently to carry the matter no further.

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Applying the same principle and mode of reasoning to the consideration of the eighth, ninth, and tenth counts of the indictment, we all concur in opinion, that the object and purpose of the agreement entered into by the defendants and others, as disclosed upon those counts, is an agreement for the performance of an act, and the attainment of an object, which is a violation of the laws of the land. We think it unnecessary to state *reasons in support of the opinion, that an agreement between the defendants and others to diminish the confidence of her Majesty's subjects in Ireland in the general administration of the law therein; or an agreement to bring into hatred and disrepute the tribunals by law established in Ireland for the administration of justice; are each and every of them agreements to effect purposes in manifest violation of the law.

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Upon the sufficiency of the 11th count, no doubt whatever has been raised.

In answer, therefore, to the first question, we are all of opinion that the sixth and seventh counts of the indictment, and those counts only, are bad in law; so that if they stood alone in the indictment, no judgment against the defendants could properly be entered up on them.

Upon the second question (*ante*, p. 86), we all agree in opinion that the findings of the jury upon the first, second, third, and fourth counts of the indictment, are not supportable in law. With respect to the first and second counts,—upon the ground that the jury not only find the eight defendants to be guilty of a joint conspiracy charged in each of these counts, but also find a certain number of those eight defendants to have been guilty of separate and distinct conspiracies under the same counts. With respect to the third count,—because they find three of the defendants guilty of a conspiracy to effect all the objects stated; the rest of the defendants, except Thomas Tierney, guilty of a conspiracy to effect part only; and Thomas Tierney a still smaller part of the objects mentioned in the third count. And a similar objection, in point of principle, applies to the findings upon the fourth *count, on which all are found guilty of the whole of the charge, except Mr. Tierney, who is found guilty of part only. And the reason and ground for such opinion is this; That as each count of the indictment charges

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one conspiracy or unlawful agreement, and no more than one, against all the defendants in such count, so the jury could find only one conspiracy or unlawful agreement on each separate count; for though it was competent to the jury to find one conspiracy on each count, and to have included in that finding all or any number of the defendants, yet it was not competent for them to find some of the defendants guilty of a conspiracy to effect one or more of the objects stated, and others of the defendants guilty of a conspiracy to effect others of the objects stated; because that is, in truth, finding several conspiracies, on a count which charges only one. The case of *Rex v. Hempstead* (1) is strong in support of this principle, when applied to the case of larceny. The indictment contains one charge: the jury cannot find more than one.

We therefore agree that the findings of the jury on the first four counts of the indictment are not authorised by law, and are incorrectly entered upon the record.

The third question (*ante*, p. 86) does, to a very considerable extent, comprise the same points of inquiry as those which form the subject of the 11th question put to us by your Lordships; and as there is a difference of opinion amongst the Judges, I beg to inform your Lordships that it is my own opinion only that I now offer in answer to this question. In order to arrive at a satisfactory answer to this question, it appears to me necessary to consider it as divided into two separate parts; namely, first, whether in the case of an indictment consisting of several counts, upon which there has been a verdict with proper findings, and a general judgment against the defendants, such judgment shall be reversed by reason of the defect or insufficiency of one or more of the counts? And secondly, upon the supposition that all the counts are good, but the findings of the jury defective as to some of them, whether a reversal of such judgment shall take place by reason of such insufficient findings. And in answer to the first branch of this inquiry, I conceive it to be the law, that in the case of an indictment, if there be one good count in an indictment, upon which the defendants have been declared guilty by proper findings on the record, and a judgment given for the Crown, imposing a sentence authorised by law to be awarded in respect of the particular offence, that such judgment cannot be reversed by a writ of error, by reason of one or more of the counts in the

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(1) R. & R. C. C. 344.

indictment being bad in point of law. In a civil action indeed, if the same state of facts be supposed; that is, one count in the declaration good in law, and others bad; a verdict finding general damages against the defendant upon all the counts; and a judgment upon the whole record for the plaintiff; the whole judgment would undoubtedly be reversed upon a writ of error, and a *venire de novo* awarded. Because, in that case, the judgment is for damages, which are given as well upon the bad count as the good: the jury having no power to find a verdict for the plaintiff upon any one count, without finding, in contemplation of law, some damages also upon that count; so that the whole amount of the damages found must be the aggregate of the separate sums found upon the good and bad counts together, and the Court cannot see how much *arises from the good count, and how much from the bad. Of necessity, therefore, and to do justice between the parties, and in order to ascertain the real damages sustained by the plaintiff upon the good count, the judgment must be set aside. No judgment of a Court can be given on an uncertain verdict, and the verdict becomes uncertain the moment the damages or any part of them are referrible to a bad count. But this rule has always been thought productive of great inconvenience even in civil cases, and has been described by Lord MANSFIELD "as so inconvenient and ill-founded a rule, that he exceedingly lamented it should ever have been established" (1). And in another case the same eminent person draws the distinction between civil suits and criminal proceedings, laying it down broadly, "that in criminal cases the rule is, that if there is any one count to support the verdict it shall stand good, notwithstanding all the rest are bad" (2); a distinction which had been already laid down by the Court of Queen's Bench in the case of *Rex v. Benfield* and another (3), "that the reason of the rule which obtains in civil actions does not hold in indictments or informations;" and "that if part of the charge in one of the counts had not been the ground of an indictment, it would only go towards lessening the punishment, and would not be a sufficient reason for arresting the judgment." Indeed it is manifest, without looking for any authority for the purpose, that there is no analogy whatever between the two cases. In criminal proceedings the jurors have no other question before them, than whether the prisoner is guilty or not guilty of the charge in the indictment; no other

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(1) *Grant v. Astle*, Doug. 730.

(3) 2 Burr, 986,

(2) *Peake v. Oldham*, Cowp. 275.

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duty to perform but that *of pronouncing him to be the one or the other. They have no concern whatever with assessing or awarding the punishment. It is the province of the Court to pass sentence on the whole or on part of the record as the law requires ; either a fixed punishment, if any statute has so directed, or if a discretionary punishment is given by law, such measure of punishment as under the particular circumstances the defendant ought to receive. The uncertainty and confusion which arise in civil suits, from a general verdict in a civil action where one of the counts cannot be supported, can never arise in a criminal proceeding. There is one count that is good, one verdict upon which the defendant is found guilty, and one sentence of the punishment awarded by law ; either a certain punishment, or a discretionary punishment, according as the one or the other is called for by the law ; but where discretionary, a punishment fixed and ascertained by the Judge who tried the cause, or by the Court of King's Bench, before which Court the defendant is brought to receive his sentence.

In the nature of the thing itself, therefore, there seems no reason or principle upon which the judgment in a criminal case should be reversed upon a writ of error, by reason of the defectiveness of one count. In cases of felony, where the indictment contains several counts, a proceeding altogether unknown to ancient times ; it is well known in practice that the various counts have been introduced, not for the purpose of charging the prisoner with divers and distinct felonies, but for the purpose of meeting any difficulty which might arise on the trial from the misdescription of the offence in a single count. An example of daily recurrence will make the point clear : In an indictment for cutting and wounding, under the statute *1 Vict. c. 85, the indictment ordinarily contains two counts at the least ; one stating the intent to have been to disable, another to do grievous bodily harm. But the only object of the prosecutor in making this double statement is, that as the charge may take a different complexion and character from the evidence at the trial, the chance of the offender's escape by the misdescription of the offence may be avoided. In no case, however, was it ever known in practice that the two counts of the indictment contained two different charges of felonious cuttings and woundings ; but one *corpus delicti* only, under two different descriptions. And if the prosecutor in any charge of felony should offer evidence tending to prove two distinct charges of felony, he would be stopped immediately by the presiding Judge, and directed

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to make his election upon which single charge of felony he intended to proceed. Now suppose in the case last put, of the two counts for the same offence, a general verdict of guilty, a sentence of imprisonment with hard labour for 12 calendar months (which is a discretionary punishment), and after the sentence passed, it should be discovered that one of the counts in the indictment was defective, in consequence of the omission of some necessary averment, and a writ of error should be brought; it would surely be against all principle both of law and reason (for as to any decision in support of such a doctrine, none can be found) that the judgment should be reversed, and the party who had been convicted on the indictment discharged from all punishment for his offence.

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It must indeed be conceded, that the practice in the case of a prosecution for a misdemeanor, so far differs from that in a prosecution for felony, that there may be (though it is not usually the case) several counts *for distinct offences contained in one and the same indictment. In that case, the prosecutor is not always put to his election, as in the case of felony; but the trial may proceed, and the sentence may be passed, for several offences distinct from each other. But the consequences, so far as relates to the present subject of inquiry, appear to be the same, both in the charge for felony, and the charge for misdemeanor. The moment the discretionary punishment is pronounced by the Judge, whether it be upon a single offence described differently in various counts of the indictment, or for divers and distinct misdemeanors charged in different counts, that discretionary punishment, so awarded by the Judge, stands in the place of the fixed punishment in the case of the felony. And the court of error has no more right to presume or to intend that any part of the discretionary punishment in the case of misdemeanor, has been awarded in respect of an insufficient count, than in the case of felony to presume that the fixed punishment has been given upon a defective count, where there is a valid count to support it.

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It was urged at your Lordships' Bar, that all the instances which have been brought forward in support of the proposition that one good count will support a general judgment upon an indictment in which there are also bad counts, are cases in which there was a motion in arrest of judgment; not cases where a writ of error has been brought. This may be true; for so far as can be ascertained, there is no single instance in which a writ of error has been ever

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brought to reverse a judgment upon an indictment, upon this ground of objection. But the very circumstance of the refusal by the Court to arrest the judgment, where such arrest has been prayed on the ground of some defective *count appearing on the record, and the assigning by the Court, as the reason for such refusal, that there was one good count upon which the judgment might be entered up, affords the strongest argument that they thought the judgment, when entered up, was irreversible upon a writ of error. For such answer would not otherwise have been given: it could have had no other effect than to mislead the prosecutor, if the Court was sensible at the time that the judgment, when entered up, might afterwards be reversed by a court of error. It is surely impossible that the Judges could have pronounced the opinion in *Rex v. Fuller* (1) if they had not been fully satisfied that the objection was unavailable in any stage of the proceedings.

It has been objected, however, on the part of the plaintiffs in error, that to allow the judgment to stand, whilst there remained a defective count upon the face of the record, would expose the defendants to some hardship or inconvenience. And the two instances which have been advanced in argument, have been, first, the difficulty of availing themselves of the judgment upon the present indictment, as a bar to a second prosecution for the same offence; and secondly, the possible difficulty of availing themselves of a pardon granted as to the offence contained in one of the counts of the indictment. If either of these consequences should really follow from holding the present judgment to be irreversible, I should pause long before I adopted the conclusion at which I have at present arrived. But I cannot, upon the best consideration, bring myself to the opinion that any such difficulty really exists. For as to the plea of *autrefois convict*, in whatever form the judgment is entered up *on the first indictment, whether generally upon all the counts of the indictment, or specially on the good count only, it is not a circumstance which would in any way affect the defendants' security. The question upon the plea of *autrefois convict* would not turn upon the frame of the former indictment or judgment, but upon the identity of the present offence for which the defendants were then upon trial, with the offence for which they were formerly tried and convicted. It would be a question of evidence only, whether the *corpus delicti* was the same in both cases; for undoubtedly the former conviction, however entered up, would

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be a valid conviction until reversed by a writ of error. And as to the objection that a difficulty would be thrown upon the defendants, in case a pardon should be granted with respect to the offences contained in those counts which were confessedly valid, and not extending to the offences in the other counts, it may be answered, that no instance can be found of a pardon granted after a judgment, which does not recite the indictment and the conviction; indeed in the case of felony, the pardon would be void without such recital (1); and if it is possible to suppose the case to happen, that after such recital the Crown should pardon not the whole of the offence in the indictment, but the offence contained in the valid counts only, there can be no doubt whatever but that the Court before whom the prisoners were brought to take the benefit of the pardon would discharge them altogether, when nothing appeared excepted from the pardon but the offences described in counts untenable in law. I do not therefore see any objection, on reason or principle, to the holding, as I conceive the law to be, that the judgment proceeds, in the case supposed, upon the good count in the indictment, and upon the *good count only; and there is certainly no authority against this position. The inference to be drawn from the case of *Young and others v. Rex* (in error) (2), is strong in support of this doctrine; and if the judgment proceeds upon the good count only, the whole difficulty is at an end.

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My Lords, with respect to the second branch of inquiry under this third question, it will not be necessary to trouble your Lordships at any length. The effect of a bad finding upon a good count, is in reality the same as no finding at all. If the finding is not such as to be sufficient to connect the defendants with the offence charged in any particular count, the effect, as to them, must be the same as if such count did not appear in the indictment. A bad finding on a good count, and a good finding on a bad count, appear to me to stand upon the same footing with respect to the validity of a judgment signed generally on the whole record; that is, that in legal presumption, no part of the judgment can be held to rest upon the one or upon the other.

And for these reasons, I offer it as my humble opinion, in answer to the third question, that there is no sufficient ground for reversing the judgment by reason of any defect in the indictment, or of the findings, or entering of the findings, of the jury upon the said indictment.

(1) 2 Hawk. P. C. c. 37, s. 8.

(2) 1 R. R. 660 (3 T. R. 98).

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To the fourth question (*ante*, p. 86), I am requested by my brethren to say that we all agree that the judgment ought not to be reversed by reason of the matters stated in the pleas in abatement, or the judgment thereon. It appears to be sufficient to say, that the law requires a plea in abatement, which is a dilatory plea, to be pleaded with certainty (1), or, as it is expressed (2), **“with precise and strict exactness,”* or, as it is laid down in *Chetham v. Sleigh* (3), *“it ought to be certain to every intent ;”* and as this is the rule in a civil action, at least the same degree of precision and strict exactness is necessary in a plea in abatement to any proceeding at the suit of the Crown. But in the present case the plea fails in precision in many particulars. The names of the unsworn witnesses upon whose evidence the bill is alleged to have been found are not given in the plea ; there is no averment that the bill was not found upon the evidence of other witnesses who were sworn, besides those who are alleged to have been examined without being sworn ; and lastly, for anything that appears to the contrary in the plea in abatement, the four witnesses upon whose evidence the bill was found a true bill, might have been authorized by law to give their evidence upon affirmation instead of upon oath. The pleas consequently are bad.

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The facts upon which the fifth question (*ante*, p. 86) arises are these: The *venire* was made returnable on the 15th of January ; the cause was therefore properly continued until that day, being a day in Hilary Term. Before the arrival of that day, however, the Court made an order that the issues joined should be tried at the Bar of the Court ; which must be understood to be a trial upon the 15th of January, the day for which the jury were summoned, and which indeed appears conclusively to be the day fixed for the trial, from the terms of the order itself. But before that day arrives, namely on Saturday, the 13th of January, the order is made by the Court (4), which is the subject of the present question. The objection taken is, that the order is conditional only, and that it is not for the appointment but *for the continuation only of the trial. But the order appears to us to be clearly within the scope and intention of the Act, and to be well warranted by the powers thereby conferred on the Court. The statute warrants the Court in appointing such day or days as it shall think fit ; and the condition, as it is termed, upon which this particular order is made, is not a condition

(1) Co. Litt. 303.

(2) Lutw. 14.

(3) 1 Lev. 67.

(4) See *ante*, p. 67.

precedent, so as to make it uncertain whether the Court intended to exercise the power or not, but merely a condition implied in the very nature of an absolute appointment; namely, a condition that it would not be used if found unnecessary. If the Court had appointed four days for a trial at Bar, and added the words "if the same shall be necessary for that purpose," no one could reasonably object that this condition imported any extension of the powers given by the Act; and the order made in the present case in effect imports no more. And as to the appointment being made for the continuation of the trial only, a power to make such order is necessarily included within the authority given by the statute. If the Court may appoint the whole trial in vacation, may it not so appoint part likewise? "*Omne majus continet in se minus.*" The trial therefore appears to have been properly continued in vacation, and the order was sufficient for that purpose; and it is the opinion of all her Majesty's Judges that this question is to be answered in the negative.

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The answer to the sixth question (*ante*, p. 86) will depend upon the principle on which the law allows a challenge to the array of the panel of a jury. The only ground upon which the challenge to the array is allowed by the English law, is the unindifferency or default of the sheriff. But no want of indifferency in *the sheriff, nor any default in him or his officers, was assigned for the cause of challenge upon this occasion.

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The array of the panel is challenged in this case upon the ground that the general list from which the jurors' book is made up, had not been completed in every respect in conformity with the requisites of the statute, but that, on the contrary, the names of 59 persons duly qualified to serve on the jury for the county of the city of Dublin, were omitted from the general list, and from the special jurors' book of the said county; but the challenge contains no accusation against the sheriff or any of his subordinate officers. The challenge by each of the defendants alleges indeed, "that a list purporting to be a general list was illegally and fraudulently made out, by some person or persons unknown;" and the challenge by Mr. Steele states further, "that the names were left out for the purpose and with the intent of prejudicing the said Thomas Steele in this cause, by some person or persons unknown;" but neither in the one case nor in the other is there the most distant suggestion that the sheriff is in fault. The sheriff therefore being neither unindifferent nor in default, the principle upon which the challenge

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to the array is given by law, does not apply to the present case. The statute has, in fact, taken from the sheriff that duty of selecting jurymen which the ancient law imposed upon him, and has substituted instead a new machinery, in the hands of certain officers, by whom the list is to be prepared for the sheriff's use. If the sheriff, when the jurors' book was furnished to him, had acted improperly in selecting the names of the jury from the book, such misconduct would have been a good cause of challenge to the array; but that which is really complained of is, that the material of the book out of which the jury is selected by the sheriff, and for which the sheriff is not *responsible, has been improperly composed. It is not, therefore, a ground of challenge to the array. And further, it is manifest that no object or advantage could have been gained if the challenge had been allowed; for if the challenge had been allowed, the jury process would have been directed to some other officer, who would have been obliged to choose his jury out of the very same special jurors' book as that which the sheriff had acted on, for no other was in existence. The same objection might again be made to the jury panel secondly returned, and so *toties quoties*; so that the granting of this challenge would, in effect, amount to the preventing the case from being brought to trial at all. The very same difficulty might occur in England, if, through accident, carelessness, or design, a single jury list, directed to be returned by the overseers of any parish within the county, were not handed over to the clerk of the peace, or if a single name should have been omitted in any list actually delivered to the clerk of the peace. The jury book must necessarily, in either case, be deficiently made up. But if such deficiency were allowed to be a ground of challenge to the array, the business of every Assize in the kingdom might effectually be stopped. That there must be some mode of relief for an injury occasioned by such nonobservance of the directions of an Act of Parliament, is undeniable; but the only question before us is, Whether it is the ground of challenge to the array? and we all agree in thinking it is not, and therefore we answer this question in the negative.

[His Lordship here dealt with the seventh question, as to the alleged defect in the entry of continuances, which is now of no practical importance.]

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As to the eighth question (*ante*, p. 86): We see no ground for varying the judgment on account of the sentences. The only difficulty that has been suggested on this part of the case, arises

upon the form of the order for entering into the recognizance, with respect to the time at which the term of seven years is to commence. The question is, whether such order is against the law; no other question can be raised upon a writ of error. There is nothing upon this record to show that the recognizance ordered is illegal; for unless it appears that it would be manifestly unreasonable, as to the sum fixed, or as to the time for which it is required, under any possible state of circumstances, a court of error has no authority to interfere. The defendants have under this sentence the power to enter into the recognizances *instante*, and thereby shorten the term for the suretyship to six years after the imprisonment has ended; and it is to be presumed, that when this sentence was passed, the Court below formed a proper judgment of the situation, means, and circumstances of the several defendants, so as to enable them to provide sureties in the amount directed.

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The argument of Lord Chief Justice WILMOT, in *Wilkes v. Rex* (in error) (1), is strong to show there can be no illegality in an order for a recognizance *to commence after a term of imprisonment which is in itself uncertain, being dependent on the payment of a fine; and this goes far to remove any question as to the illegality of the present order.

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We all agree, therefore, in thinking the eighth question proposed by your Lordships is to be answered in the negative.

As to the ninth question (*ante*, p. 86): The errors in fact assigned in the writs of error *coram nobis*, by each of the defendants (except Thomas Steele) were the same; viz., that the bill of indictment was found and returned a true bill by the grand jury, upon the evidence of divers witnesses, whose names are enumerated, and of no other persons; and that these witnesses, previous to their examination before the grand jury, were not sworn in the Court of Queen's Bench, as required by the 56 Geo. III. c. 87; nor lawfully bound, by affirmation or declaration, to give true evidence before the said grand jury. In the case of the writ of error *coram nobis*, brought by the defendant Thomas Steele, the error assigned was this, that the indictment was not found in the manner required by the statute 1 & 2 Vict. c. 37, inasmuch as that, in stating on the back of the said alleged bill of indictment the names of witnesses who had been sworn, &c., neither the foreman, nor any other member of the grand jury, did

(1) Wilmot's Notes of Opinions and Judgments, 322.

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authenticate by his signature or initials, as is required by the statute, that the said witnesses, or any of them, had been sworn, or made affirmation or declaration; nor that no other witnesses, save those named in the assignment of errors, were so sworn or affirmed, or examined before them.

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My Lords, with respect to the assignment of errors in fact, grounded on the noncompliance with the statute 56 Geo. III., the answer appears to us to be, that *the subsequent statute 1 & 2 Vict. c. 37, operates as a virtual repeal of the former, as well in the Court of Queen's Bench as in other Courts of criminal jurisdiction in Ireland.

If the question had been *res integra*, a doubt might, perhaps, have been entertained, upon the construction of the statute, whether the Court of Queen's Bench and the Commission Court of Dublin had not been omitted in it by mistake. We know, however, that the judgment of the Irish Judges, from the time of passing the Act, after deliberate consideration, has in several instances declared the practice which is now objected to, to be in conformity with the law, and that the practice of swearing witnesses has been in accordance with such opinion of the Judges; and as there are, undoubtedly, words in the statute which will well warrant this construction, we think such decision of the Irish Judges ought to be supported.

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The later statute recites the Act 56 Geo. III., which applies in terms to the returning bills of indictment by "any grand jury in Ireland," and then recites the inconvenience by the administration of the oath in Court; that is, in terms as general as the former, in every Court in the kingdom. From the preamble, therefore, it might well be expected that the alteration about to be enacted would be general and without exception; the enacting words are accordingly, "that in all cases where bills of indictment are to be laid before grand juries in Ireland for their consideration, the clerk of the Crown at the Assizes, and clerk of the peace at Quarter Sessions, shall make the indorsement thereon directed." To give this enactment its full force, that is, to make it apply to all cases, those particular officers must be held to be named only in the way of examples or instances of the proper officers, *in those particular Courts, who are to make the indorsement; not to be named by way of restraining the general application of the statute to those Courts only, where the officers of that precise description are found. It certainly would be a very

singular and anomalous mode of introducing a restraint upon the general words of a beneficial and remedial Act.

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The clerk of the Crown in the Court of Queen's Bench, and the clerk of the Crown at the Assizes, hold offices and perform duties that are perfectly analogous to each other; and this construction receives further confirmation by the enactment in the same section, that the oath or affirmation directed by that Act is not to be in addition to, "but in lieu of that heretofore administered in Court, under the provisions of the said Act passed in the 56 Geo. III.;" words that necessarily import the oath is no longer to be given at all, under the former statute.

And to show the little force attributed by the Legislature to the expression "clerk of the Crown at the Assizes," in the former part of the section, it is directed in the latter part of the same section, that the foreman of the grand jury shall not have power to examine any witness in support of a bill, whose name shall not have been previously indorsed on such bill of indictment, by the "clerk of the Crown (not clerk of the Crown at the Assizes) or clerk of the peace respectively."

Upon a reasonable construction of the statute, we therefore think this ground of objection is removed.

And with regard to the error in fact assigned by the defendant Thomas Steele, it is manifestly founded on a part of the section that is directory only, and not essential. The oath must have been already administered (which is the essential part of the enactment) *before: in the language of the statute, "the foreman who shall have administered the oath" is directed to state the names of the witnesses sworn, and to authenticate the same by his signature or initials; that is, before the objection above made can possibly arise. As a matter of convenience at the trial, in order to ascertain at a glance whether the witness examined before the Crown jury was one of those who appeared before the grand jury, such direction ought undoubtedly to have been complied with; but it cannot be the law, that after the witness has been duly sworn and examined, and the bill returned a true bill upon his evidence, it can be deprived of its legal operation and character by reason of the foreman of the grand jury having neglected to comply with such direction of the statute. The ninth question, therefore, we all concur in opinion must also be answered in the negative.

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As to the tenth question (*ante*, p. 86): after causing search to

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be made in the Crown Office, no instance can be found of such an entry, where the party is found guilty of any part of the indictment on which he receives judgment; and we think such practice is in conformity with the law. For it appears from Lord Hale⁽¹⁾, that the acquittal by the jury regularly, is a warrant for entry of the judgment at any time afterwards; so that the judgment *quod eat sine die* may be entered by the Court below on the application of the defendant, even after the time the writ of error is brought. We are all of opinion, therefore, the tenth question is to be answered in the negative.

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Upon the last question (*ante*, p. 86), I consider that I have, in answer to the third question, already *anticipated those observations which would otherwise have applied themselves to the present. I have stated the opinion at which I have arrived to be, that a general judgment upon the whole record is not to be reversed upon a writ of error, by reason that one or more of the counts are bad, and the remaining counts good, and the verdict has been a general verdict of guilty: and I have also stated my opinion, that it would make no difference in this respect, that the punishment is a discretionary punishment. The only part of this question remaining to be considered, is whether the entry upon the record, being "that the defendant for the offences aforesaid be fined and imprisoned," be of itself a ground of reversal.

The exact expression upon the record to which our attention has been directed is, that the defendant, "for his offences aforesaid, be fined and imprisoned;" and as I presume your Lordships wish us to consider the question with reference to that record, I proceed to answer the question as if it stated the sentence in the latter form.

I interpret those words, in their plain literal sense, to mean, "such offences as are set out in the counts of the indictment which are free from objection, and of which the defendant is shown by proper findings on the record to have been guilty:" that is, in effect, the offences contained in the fifth, the eighth, and all the subsequent counts. And I see no objection to the word "offences," in the plural, being used, whether the several counts last enumerated do intend several and distinct offences, or only one offence described in different manners, in those counts. For whilst the record remains in that shape, and

(1) 2 Pl. C. 243.

unreversed, there can be no objection in point of law, that they should be called "offences," as they appear on the record. *If the words had been for his "offence aforesaid," then the objection would have taken the same form as that made in *Rex v. Powell* (1), and it would have been urged that there were more offences than one upon the record; and it might perhaps have been difficult to sustain the statement, by reason of the word offence being *nomen collectivum*.

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I therefore think, but I offer it as my own opinion only, that this, the eleventh question, is to be answered altogether in the negative.

PATTESON, J. :

My LORD CHIEF JUSTICE having delivered the joint opinion of her Majesty's Judges, as to all the questions proposed by your Lordships, except the third and eleventh, I proceed to give my humble opinion upon those questions.

The third question appears to me to consist of two parts: the first, regarding the consequence of any defect in the indictment itself; the second, regarding the consequence of any defect in the findings of the jury upon the trial.

With respect to the first, I will take the liberty of answering it together with the eleventh question, which I conceive to be in effect the same; for the only defect in the indictment is that two of the counts, namely, the sixth and seventh, are bad.

With respect to the second, viz. the consequence of the defects in the findings of the jury, I am of opinion that those defects, so far as they relate to the fourth count, are cured by the entry of a *nolle prosequi* as to the defendant Thomas Tierney.

As regards the first and second counts, I am of opinion that there is not any sufficient ground for reversing the judgment by reason of the defects in *the findings of the jury, or the entering of those findings, upon those counts. I apprehend that it was competent to the jury to find the defendants guilty of a conspiracy to do part of the things stated in those counts; and that there is no variance between the conspiracy so found and that laid in those counts, although the latter contains also other matters. This seems to have been established in principle in the case of *Rex v. Hollingberry* (2).

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The jury, then, having found all the defendants guilty of a

(1) 2 B. & Ad. 75.

(2) 4 B. & C. 329.

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conspiracy to effect part of the objects stated in the first and second counts, which finding is sufficient to sustain the judgment, all the rest of the finding, although wrong, appears to me to be mere surplusage and inoperative. Having found all the defendants guilty of a conspiracy which was described in those counts, the jurors had performed their office; and in proceeding to add that some of the defendants were guilty of another conspiracy (even though that finding, if it had stood alone, might have been sustained), they have acted without any jurisdiction, and that part of their finding must be rejected. The finding upon the third count I consider to be a verdict of guilty against three of the defendants for a conspiracy to effect all the objects charged in that count; and that, in substance, it is a finding of not guilty as to all the other defendants. It might have been more in accordance with the evidence, or more correct, to have found, as upon the first and second counts, all the defendants except Tierney guilty of a conspiracy to effect all the objects stated in the count, except the exciting disaffection in the army; yet I think that the judgment cannot be reversed for the defective finding, but that all the finding after that *of guilty against three of the defendants, must be rejected as surplusage.

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If, however, this view of the case should be wrong, still I am of opinion that the bad findings can have no other, either greater or less effect, than the badness of the counts would have had; which is, that any judgment which necessarily rested upon those counts would be erroneous. This part of the third question therefore, would, at most, only become identical with the other part of the same question, and with the eleventh question, which I now proceed to consider.

The eleventh question is one of very general application, and may arise in many cases in the course of the administration of criminal justice.

It seems to be argued upon this question, that there is so strict an analogy between a general verdict for damages in a civil action, where the declaration contains several counts, and a judgment upon an indictment which contains several counts, as that a court of error must act upon such analogy, and apply the same rule in criminal cases as is usually applied in civil cases, viz., that one bad count is fatal to the judgment, not on that count, but on the good ones. That rule has been considered as a very inconvenient and bad rule, by Lord MANSFIELD on several occasions,

Grant v. Astle (1), *Peake v. Oldham* (2), and other cases, in which, as in that of *Rex v. Benfield* and another (3), the same learned Judge stated that the rule did not apply to indictments. Whether the rule is good or not, it is plain that in civil actions it is founded on the impossibility of the Court, whose duty it is to pronounce judgment, being able to ascertain what judgment to *give. The verdict of a jury, in order to have its full effect, must be followed by a judgment of the Court; and if that verdict be uncertain, the Court cannot pronounce judgment at all. When a declaration contains several counts claiming damages, the jurors must give some damages upon every count which they find in favour of the plaintiff; and if they do not apportion the amount of the damages separately to each count, and one be bad, it is obvious that the verdict becomes immediately uncertain, and no judgment can be pronounced; not for the whole damages, because it is plain that as to some part the verdict is wrong, but as to what part the Court cannot tell, and therefore cannot give judgment for part; the judgment must therefore either be arrested, or a *venire de novo* awarded: *Levin v. Edwards* (4). But in criminal proceedings, the jurors merely find the party guilty or not guilty; they have nothing to do with the punishment, or with anything at all analogous to assessment of damages in civil actions. The Court is free to give judgment on the whole, or on part of the indictment, as the law may require, and no uncertainty can arise; therefore the reason for the rule in civil actions, does not and cannot apply to criminal cases.

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But if, on general principles and rules of law, a general judgment on an indictment consisting of several counts, on all which the defendants are found guilty, must be taken to apply in part to each count; and if the sentence pronounced is to be taken as the aggregate amount of several separate sentences, one on each count; then the analogy may hold, though the reason of the rule does not apply.

I believe that this is the first time that any such notion has been suggested. Certainly, the practice of *all criminal Courts has been to pass sentence generally in all cases of felony, whatever number of counts may be contained in the indictment; but then there is really but one offence, for although two or more distinct felonies may be joined in one indictment, yet in practice the

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(1) 1 Doug. 730.

(2) 1 Cowp. 276.

(3) 2 Burr. 980.

(4) 9 M. & W. 720.

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prosecutor is usually put to his election to proceed on one only. I am not aware of any instance in which a writ of error, in a case of felony, has been brought on account of there being one bad count in the indictment. So in indictments for misdemeanors, if there is really more than one offence contained in the indictment, the prosecutor is not usually, as in felony, put to his election, but the defendant may be convicted for several offences. If he should be so convicted, it is most usual to pass sentence separately for each offence; that is, to give judgment separately, not on each count, but, so to speak, on each class of counts, treating them as if they were separate indictments. That course, however, is not always pursued; but one sentence is sometimes passed, where no greater punishment is inflicted than might be under any one of the counts, if it stood alone. If there be in truth only one offence, stated in various ways, the sentence is, I believe, invariably general. The universally received opinion has been, that one good count would sustain such general judgment. Lord MANSFIELD, in the cases I have alluded to, distinctly states it to be so, and no decision or *dictum* is to be found in the books the other way. Motions in arrest of judgment have, indeed, been made on account of the indictment containing one or more bad counts; but the Courts have always refused the motion, and said that it was immaterial, as there was one good count: *Rex v. Rhodes* and another (1). It should *seem that in such instances the Courts must have proceeded to give judgment in the general form commonly used, without confining it to the good count, because, having refused the motion, they have not even determined whether the count objected to was bad or not; and yet no one ever thought of bringing a writ of error upon such judgment. No instance of such a writ of error is to be found. When there is a doubt at the Assizes as to questions of the sort, judgment is usually respited; and when that is done, nothing can be inferred as to the present point. But there is one case, *Rex v. Hill* (2), in which sentence was passed at the Assizes for a misdemeanor, and afterwards certain points were submitted to the Judges, who held that one of the counts was bad; yet as the rest were good, it did not occur to them to recommend a pardon, which they ought surely to have done, if the sentence or judgment was reversible by writ of error. Looking at any record of conviction where there are several counts, and a general verdict of guilty, and a general judgment, a court of error cannot indeed tell whether, in point of fact, more

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(1) 2 Ld. Ray. 886.

(2) Russ. & Ry. C. C. 190.

than one offence was proved or not; and it may be assumed, for the purpose of this argument, that such Court is bound to suppose that as many offences as there are counts were proved. Yet, if the sentence be such as might be passed on any one count, there is no reason why the court of error should not consider that the Court below has passed sentence on all the counts indeed in point of form, but applied the whole punishment to one offence, if there be but one, or to each offence if there be more than one; and not part of the punishment to the offence contained in one count, and part to that contained in another. This *must be the case in capital cases, where there can be but one sentence of death, though there be many counts; and also in cases where, in the terms of your Lordships' question, the punishment is fixed by law, and only one such punishment is mentioned in the judgment; and I see not why it may not be equally so where the punishment is discretionary.

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If there be any question afterwards in a court of error as to the sufficiency of any count, surely that Court is bound to suppose that the Court below, not having given a separate judgment on each count, has given its whole judgment and passed its whole sentence in respect of each count; and then the judgment will rest and be supported on those counts which are properly constructed, and on which the defendant has been found guilty in due and proper form, notwithstanding there may be other counts which are bad: and that I understand to be the meaning of the words in the present judgment, "for his offences aforesaid;" that is, for those offences which are properly charged and properly found against him, the whole punishment being for each offence, and the maxim of *utile per inutile non vitiatur* will fully apply.

It is said that such a view of the case works hardship on the defendants, for they cannot tell on which counts they are really convicted, so as on any future occasion to be able to plead *autrefois convict*. Now such a plea, if controverted by the Crown, must in all cases be supported by proof of the identity of the offence; and if the supposed subsequent indictment should consist of the good counts of the former indictment only, it is conceded that the defendants will not be placed in any difficulty; but if of the bad counts of the former indictment, it is said that the defendants will be placed in difficulty, since their plea would be *answered by its being said, You were not convicted, because those counts were bad.

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This appears to me to be a most palpable fallacy. In the first place, it cannot lie in the mouth of the prosecutor so to say; for the former conviction on the bad counts remaining unreversed, is a good conviction, be the counts never so bad. In the next place, the correspondence of the precise language of the first and second indictments is wholly immaterial to the plea, if the offence be shown by evidence to be the same.

Something was said as to the possibility of a pardon for one or more of the offences, and the defendants not being able to know how much of the judgment would thereby be remitted; but this argument goes too far; for it would, if valid, show that a general judgment was always bad, even where all the counts were good.

The case of *Young and others v. Rex*, in error (1), is an authority in favour of the doctrine that one good count in an indictment will sustain a judgment, notwithstanding other bad counts. But perhaps the nearest case to the present is that of *Rex v. Powell* (2), which was also one arising upon a writ of error from the Court of Quarter Sessions to the King's Bench. There the indictment contained two counts; one for an assault with intent to commit a rape, the other for a common assault. The entry of the verdict was, that the defendant was guilty of the "misdemeanor and offence aforesaid," in the singular number, and the point discussed was whether those words were *nomina collectiva* or not; if not, then it would be uncertain on which count the verdict proceeded, and if it proceeded on the second, the judgment would be bad, because the defendant was sentenced to be imprisoned with *hard labour during the whole time; whereas for a common assault hard labour cannot be imposed. The Court held that the word misdemeanor was "*nomen collectivum*," and therefore the verdict applied to both counts. It never, however, occurred either to the Court or to the defendant's counsel to suggest that if the verdict did apply to both counts, the judgment, which was general, must also apply to both; and as every part of the time of imprisonment was accompanied with hard labour, it would follow that some part of the judgment was erroneous; viz. that part, whatever it might be, which applied to the second count; and as the Judges in the court of error could not tell how much of the judgment was bad, they could not reverse it in part, but must reverse it in the whole. Yet if the doctrine now contended for by the defendants (namely, that every general judgment, where there

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(1) 1 R. R. 660 (3 T. R. 98).

(2) 2 B. & Ad. 75.

are several counts, must be taken as the aggregate of several judgments, one on each count) be right, such ought to have been the result; and though this case is no direct authority to show that that doctrine is not right, yet it is a strong presumptive argument the other way, and, at all events, shows, amongst the other books and authorities, what has hitherto been the received opinion and practice on the subject.

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For these reasons I am of opinion that a judgment given under the circumstances stated in the question lastly proposed by your Lordships, cannot be reversed on a writ of error, and that it makes no difference whether the punishment be discretionary or fixed; and, as I have said already, I think that the same reasoning applies to the third question; not only as to that part of it which relates to defects in the present indictment itself, but to that part which relates to defects in the findings of the jury. Assuming the *judgment to be bad as regards the first, second, third, sixth, and seventh counts of this indictment, by reason of the defects of the findings on the first, second, and third counts, and by reason of the defects in the sixth and seventh counts themselves, still it remains an entire and good judgment on the other counts of the indictment, and cannot be reversed.

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MAULE, J. :

As to the third and the eleventh questions, I agree in the conclusions at which my LORD CHIEF JUSTICE and my brother PATTESON have arrived. When a person is convicted on a criminal charge, the Court, in order to determine what judgment to pronounce, must first look at the record to see of what he is convicted, and must then inquire what penalty the law imposes for such a conviction. If the penalty be fixed by law, as in case of judgment of death, and in some cases of transportation for life, no further inquiry is necessary. Nothing but the law and the record are to be looked to, and the judgment required by law is to be pronounced. But in those cases where the law fixes only the species or the limits of the judgment, leaving the amount of punishment to the discretion of the Court, there is a third inquiry to be made; namely, what amount of punishment of the legal description, and within the legal limits, is suitable to the particular case in which judgment is to be pronounced. The Court must look beyond the record to determine this last question of amount. If it could not do so there would be no reason for leaving any discretion to the Court, and the amount

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could be fixed by the law, and if it could, no doubt it ought to be and would be so fixed; and accordingly the universal practice is for the Court to look beyond the record in such cases, in order to *determine from the circumstances of the case the amount of punishment. In cases of conviction on a verdict, the evidence given at the trial is usually the main source of information on this subject; but other modes of ascertaining what ought to be the amount of punishment under the circumstances are occasionally adopted; so that the record in such cases only points out the species of the punishment; as, for instance, fine and imprisonment. When that is once pointed out the record affords no further assistance, and the amount is to be determined by the circumstances of the case, which do not appear on the record.

With respect to the questions whether the record finds any offence, and what the species of punishment should be, as no more is necessary to determine this than a right construction of the record and a knowledge of the law, they are fit subjects for a writ of error, by which the record is brought before a superior court of law. But the question of the amount of punishment is not a subject for a court of error, which has not before it the evidence at the trial, or the other matters which determined the amount of punishment. It appears to me, therefore, that when the record states that the defendant has been convicted for an offence for which he is liable to be sentenced to pay a fine and to be imprisoned, and to find sureties, and he is sentenced to pay a fine, be imprisoned, and find sureties, it is no ground for reversing the judgment, that there are other parts of the record on which, if they stood alone, no judgment could be passed. If it were otherwise, it might well be that a judgment would be reversed by a court of error, which, if it had been in the place of the Court below, would have sentenced the defendant to the very same species and amount of punishment. I think, therefore, *that neither in the record referred to in the third question, nor in that supposed in the eleventh, the judgments can be reversed on writ of error.

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COLTMAN, J. :

The LORD CHIEF JUSTICE of the Common Pleas having delivered the unanimous opinion and reasons of the Judges upon all your Lordships' questions except the third and the eleventh, it is unnecessary for me further to advert to any other than those two.

And to the third question I answer, that in my humble opinion

here is sufficient ground for reversing the judgment, by reason of the defects of the indictment, and by reason of the defects of the findings of the jury, and the judgment given thereupon; and I ground my opinion upon the reasons which will be given at length in the answer to the eleventh question; to which reasons I crave leave to refer, and which appear to me to apply equally to all the defects to which the question refers.

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To the eleventh question I answer, that in my humble opinion, where an indictment consists of three counts, A., B., and C., and the counts A. and B. are good and the count C. bad, and judgment is given that the defendant, for the offences aforesaid, be fined and imprisoned, such judgment being sufficient in point of law if confined expressly to the counts A. and B., such judgment ought to be reversed on error.

I am well aware that a contrary opinion has existed generally amongst the members of the legal profession; but there is no difficulty in seeing what has given rise to this general impression; and when we look for any legal authority to support it, there is little or none.

The authorities relied on arose on motions in arrest *of judgment, or the expressions used are with reference to the state of things before judgment is pronounced, and are quite true as applied to criminal proceedings in that stage; but the case may be different after judgment has been given.

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The authorities relied on are, *Reg. v. Ingram* and wife (1), *Peake v. Oldham* (2), *Grant v. Astle* (3), *Rex v. Benfield* (4), and are all subject to the observations above made, that they are true with reference to that stage of the cause with reference to which they were made, but not applicable to the question when it arises on error after a judgment recorded.

One case has been found, *Rex v. Young* and others (5), in which there were four counts, two good and two bad, and a general judgment was given of transportation for seven years; and this was held good in error, notwithstanding the badness of two of the counts. But the objection raised in this case was not noticed by the Court in the judgment of the Judges, nor does it appear to have been at all insisted on in argument. It is therefore to be considered not a decision, but a precedent only; and in a court of

(1) 1 Salk. 384.

(4) 2 Burr. 980.

(2) Cowp. 285.

(5) 1 R. R. 660 (3 T. R. 98).

(3) 2 Doug. 730.

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error, where the question now arises for the first time, cannot be considered as a binding authority.

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If we consider the question on principle, the argument in support of the sufficiency of the judgment seems to me to stand thus: where there is but a single count in an indictment, as was the case in old times, although it contains several superfluous and idle allegations, if yet it contains pertinent matter, properly alleged, and sufficient to sustain a criminal charge, the Court is warranted in passing the appropriate judgment on the whole count, and may wholly pass by the superfluous and idle matter: and in like manner, now that it has become usual to insert many counts in an indictment, it may be argued, that if there be one good count, and others which are bad, the Court, on looking at the whole record, may treat the bad count as idle and superfluous matter, and passing it by without regard, give the appropriate judgment which is suited to the good count: and the practice at the Assizes is in conformity with this view of the case, where it is not usually the custom to do more than give a general judgment on the indictment, without stopping to consider whether any of the counts are bad in point of law.

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But to this view of the question I should answer, that I do not conceive the case of an indictment with a single count containing some idle and superfluous allegations, can be considered as standing on the same ground with the case of an indictment containing several counts, some good and some bad; for in the former case the indictment professes to contain one criminal charge only, in the latter it professes to contain several distinct charges, and each count is in the nature of a separate indictment; and I conceive that the defendant is entitled to know on which of those charges he is sentenced, and which of them are passed by as insufficient in law. And the reason why I conceive he has that right is, that if he is convicted of an offence, though upon an insufficient indictment, and judgment is pronounced upon him, and he undergoes the punishment of the law, he may plead the conviction to any other indictment for the same charge. In the case supposed in your Lordships' question, if the defendant were again indicted for the same offence as that which is insufficiently charged in count C., and were to plead the former conviction, how is the Court to deal with the case? how is it to know whether the party has suffered the sentence of the law or not?

It may be said that the Court has only to look to the original

record; it will then see that the count is bad, and must infer that the Court which passed the sentence was aware of the defect in the count, and did not pass any portion of its sentence in respect of it. This reasoning would be quite just, if courts of law were infallible; but as all writs of error proceed on the ground of the recognized fallibility of human judgment, the presumption that the Court has not committed an error is not a safe one to act upon, and may be directly at variance with the fact. Surely there ought to be some more safe ground from which to judge what the Court has done. Every record ought to speak explicitly and distinctly. The Court ought in some intelligible way to show distinctly the grounds on which it has proceeded, in order that the party may not lose the benefit of the plea he is entitled to, and the court of error be enabled to see whether there has been an error committed, and to redress it if it exists.

Lord Coke says (1), "In the case of acquittal the judgment is *quod eat sine die*, which may be given as well for the insufficiency of the indictment as for the party's innocence or not-guiltiness of the offence; and the Judges of the cause ought, before judgment, to look into the whole record, and upon due consideration thereof to cause it to be entered *ideo consideratum est quod eat sine die*." And it is said by Lord Hale (2), in speaking of an acquittal where the indictment is insufficient, "It is reason to have the *eat sine die* special in that case, *eo quod indictamentum apparet minus sufficiens, ideo consideratum est quod eat sine die*; and then it (the acquittal) is applicable only to the insufficiency of the indictment."

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The remarks of these two eminent Judges are here made with reference to the entry of a judgment upon an acquittal; in fact, upon an insufficient indictment. But where the prisoner excepts to the insufficiency of the indictment, or the Court does it *ex officio*, Lord Hale, in the same chapter (3), says, "The judgment is special, *quod indictamentum ob insufficientiam cassetur, et quod*, the prisoner *eat inde ad præsens sine die*." And such an entry as to the insufficient count would, I conceive, have been a proper one in the case supposed in your Lordships' question. The judgment might perhaps have been free from error if it had been expressly confined to the good counts, and no judgment at all given on the bad count; but where the judgment is, as in the case supposed, general, it must be considered as having been given on all the

(1) 3 Inst. 214.

(2) Vol. 2, c. 55, p. 393.

(3) 2 Hale's P. C. p. 395.

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counts, and here indeed is expressly said to be so. One of the counts being bad, the judgment seems to me erroneous.

It may be urged, that although, according to the modern practice of the Courts, various counts are inserted, yet there is usually but one *corpus delicti* really intended. That such is usually the case in felonies is true, and if it turns out to be otherwise, the Judge in his discretion may restrict the prosecutor to one charge; but the practice is otherwise in misdemeanors like the present, and the point therefore cannot be considered as merely technical.

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If we suppose a case, which must be allowed to be possible, that the Court below, mistaking the law, passes a judgment with reference to a count which *contains no legal charge, and the party sentenced undergoes his punishment, if he should be again indicted for the same offence, it would be manifestly unjust that he should be liable to further punishment; but if in such case he should plead the former conviction, the Court before whom the second indictment is pending, looking at the original indictment, will say, contrary to the fact, "The Court by which the case was first tried must have seen that this count C. is bad; the defendant could not have been sentenced on this count." Or if the Judges of the Court before which the second indictment is pending should allow the plea on the ground that they cannot see but that the Court which passed judgment on the first indictment might have given judgment with reference to the bad count, there will then be introduced into practice an inconsistency of a very strange nature: the court of error, on looking at the record of the judgment, will hold that it must be presumed that the Court below passed no judgment with reference to the bad count; while the Court before which the second indictment is pending, on an inspection of the same record, will presume that a judgment was given with reference to that count. Such an inconsistency ought not to be admitted, if the law is to be considered as anything in the nature of a science, or as anything more than a rude collection of arbitrary rules.

It may be said that the rule against which I am arguing is convenient in practice. It may be so; and if established, it may save the practitioners and the Judges some expense of care and diligence, though I think not much. But such a rule seems to me neither consistent with the dignity of the law as a science, nor, what is more important, does it tend to promote the ends of substantial justice. If a judgment *in such a case were reversed, it

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is to be remembered that the defendant would still remain liable to be prosecuted on an indictment properly framed.

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In reply to the latter portion of the eleventh question, it seems to me, that if the punishment attached to counts A. and B. were certain, as for instance a year's imprisonment, and the judgment were that for his said offences he should be imprisoned for a year, the same reasoning would apply, though partially only; for although the probability in that case would be greater that the judgment was given in respect of the counts A. and B., and not in respect of the count C., yet I think it ought to appear distinctly on what count the judgment was given. The judgment, however, in such a case would be substantially just, though untechnical; which cannot, I think, be predicated of that in the former case.

WILLIAMS, J. :

The difference of opinion which to a certain extent exists amongst the Judges, arises either upon the third or upon the eleventh question proposed by your Lordships, or upon both. In my view of the subject, however, that difference will be found to arise upon the eleventh.

But before I proceed to notice the point or points upon which a difference of opinion exists, I think it not unfit to premise, that, as to what may be deemed the merits, there is no such difference. There is no doubt, as your Lordships have already heard (so far as the opinion of the Judges is concerned), but that there are good counts in the indictment, with appropriate findings thereon, which would have sustained the judgment; no doubt but that the judgment, so far as the kind and quality of the sentence is concerned, is unobjectionable; none, but that the decision of the Court below upon the matters contained in the plea *in abatement*, and those assigned for error *coram nobis*, was correct in point of law; none, but that, if a motion had been made in arrest of judgment in the Court below, that motion, according to all usage and authority, ought to have been refused, because there are good counts; none, I believe, but that, if a *nolle prosequi* had been entered upon the objectionable counts and findings, no objection would have existed. The objection, therefore, is purely of a technical nature, and to be examined in the same spirit of minute and exact criticism in which it is conceived.

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I have said, however, that the difference of opinion amongst the Judges does really arise upon your Lordships' last question; and for this reason: because, in my opinion, where the language of the

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judgment is (as here it is) that each defendant shall "for his offences aforesaid" suffer punishment, a good count or counts, with a bad finding thereon, does not differ from the case of a general finding which is unexceptionable, upon an indictment containing one or more bad, with some good counts in such indictment. Now the LORD CHIEF JUSTICE has delivered our unanimous opinion that there are several counts, good in law, upon which the finding of the jury is so defective that no judgment can be sustained thereon; and they therefore must, in my opinion, be classed with those counts which the Judges are of opinion are insufficient in point of law. There are other counts also which, according to the same opinion, are clearly good, and the finding of the jury thereon unexceptionable.

I come therefore to the eleventh, and (see *ante*, p. 86) the last but most important question, as I think it has been throughout, and in my opinion rightly, treated.

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In considering this question, it is to be observed, first, that so far from any instance having occurred in which this objection has prevailed, the constant opinion, founded upon corresponding usage, has been that a judgment under the circumstances supposed would be good and valid in law. I will not place this argument higher than it deserves; there may have been an ancient and long-continued error, though that ought to be shown, and not presumed; but it is good for something, and it is for your Lordships to judge how much. If, indeed, it be entitled to the weight which Lord Chief Justice WILMOT, in *Wilkes's* case (1), attributes to it, it goes very far indeed; "for a course of precedents and judicial proceedings," he observes, "makes the law."

Upon the same footing with the prevalence of opinion and usage, I am inclined to rank the *dicta* of Lord MANSFIELD, in the cases of *Peake v. Oldham* (2) and *Grant v. Astle* (3), in both of which (in the latter more especially) he deprecates the rule which has prevailed in civil cases, "which," he says, "appears more absurd, because it does not hold in the case of criminal prosecutions; for where there is a general verdict of guilty on an indictment consisting of several counts, if any one of them is good, that is held to be sufficient." This surely must be entitled to some weight; the deliberate (because repeated) opinion of a Judge of much reputation; not, indeed, so much expressing that opinion, as vouching what had been done,— "held to be sufficient;" for that is the language.

(1) Opin. & Judgts. 330.

(2) Cowp. 276.

(3) Doug. 729.

In the case of *Rex v. Powell*(1), the defendant was convicted upon an indictment containing two counts; *one of these authorised the infliction of hard labour, and the other did not. Upon a general verdict of guilty upon the whole indictment, the defendant was sentenced to imprisonment with hard labour; and, upon a writ of error brought, the Court of Queen's Bench sustained the judgment of the Court below, although one count of the indictment (as has been already observed) was not sufficient for that purpose.

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In the case of *Reg. v. Rhodes and Colle* (2), a point nearly resembling that which was pressed with the greatest earnestness at your Lordships' Bar was brought under the notice of the Court, upon motion in arrest of judgment. That was an information for subornation of perjury, and the verdict guilty. The report goes on thus: "A motion was made in arrest of judgment, and the counsel excepted (first) to several of the assignments of perjury; and he compared the case" (as was done at the Bar) "to that of general damages, where one count, being insufficient, will vitiate the whole. So here," (this is a continuation of the counsel's argument), "the defendant being to be fined upon the whole information, and that fine being entire," (as here also contended), "if any of the assignments of perjury are wrong, the Court will arrest the judgment. But Holt and the whole Court were of the contrary opinion, and that, if all the assignments of perjury, but one, be wrong, that one would be sufficient for the judgment to be given upon by the Court."

I now come to a case which will not admit of that distinction, and will not admit of that answer, that it was not upon a writ of error, for it was. The case which I now beg leave to bring under your Lordships' *notice is that of *Rex v. Young and others* (3), which, if I am not wholly deceived, has a very strong, if not decisive bearing upon the present case. (His Lordship stated it.) This case also followed in point of time that of *Rex v. Mason*, which established the law, that a count not setting forth the nature of the false pretences, was bad in law. The case of *Rex v. Mason* was cited, and brought distinctly under the notice of the Court, of which Lord Kenyon and Mr. Justice Buller were members. The badness of two counts in the indictment was placed beyond a doubt: and herein I must take leave, with great deference, not perfectly to agree with my brother COLTMAN; for I think, upon reference to the case, it will be found that the very point of there being two bad

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(1) 2 B. & Ad. 75.
(2) 2 Ld. Ray. 886.

(3) 1 B. R. 660 (3 T. R. 98).

O'CONNELL v. REG. counts (and bad counts because *Rex v. Mason* had decided them to be so) was distinctly before them. The defendants were found guilty generally, and sentence passed upon the whole indictment; the sentence was discretionary, for the punishment might have been imprisonment, or (as it was) transportation; the bad counts might have contributed there to swell the punishment, and nobody could tell how much; a learned counsel of very considerable reputation was heard at length, and the Court (composed as I have mentioned), without hearing the other side, affirmed the judgment. Now if that be not a case in point, so far as the eleventh question is concerned, I am at a loss to comprehend what can be so considered.

[*279] And now, as to the principle; and upon this part of the case I beg leave to state, almost in the same terms which my brother MAULE used some time ago, that the question before a court of error, in my *opinion, is the legality of the proceedings of the Court below; not what the Judges ought to have done (speaking with reference to the infliction of punishment), but what they might do. If a sentence be of the kind which the law allows, the degree of it is not within the competence of a court of error. If a fine be an appropriate part of the sentence of a Court below, the excess of it is no ground of error. What possible line can be drawn between reasonableness and excess, so as to affect it with illegality? It is obvious that there can be none. The fine imposed may be of such extravagant amount, as justly to subject the Court which has imposed it to severe animadversion; it may be unconstitutional (if such a phrase is permitted to me), but it is not therefore, with reference to interference by a court of error, illegal. If, in this case, the sentence had been transportation, the sentence would have been illegal: and why? Because it is not of the kind which is authorized by the law in such case. Why is a fine, apparently excessive and exorbitant (supposing such a case to exist), not illegal? Because it is the kind of punishment appropriate to the case. The result of my opinion therefore is, that the inquiry in a court of error must be, whether there be a count or counts, with proper findings thereon, which could justify the sort of punishment adjudged by the Court below; and that this is the only question, wholly unaffected by another and different one, which is, whether there are other counts in the indictment, which would not justify the infliction of such punishment, or of any.

I further think that there is no difference whether the punishment be discretionary, or fixed by law. If there be an indictment

for an offence to which a punishment fixed by law is attached, that would sustain *a judgment upon such indictment, though there may have been in it one or more bad counts. Equally so, in my opinion, may a discretionary punishment be sustained, if it be otherwise conformable to law, though there should be, as just supposed, some good and some bad counts; and that the judgment should be referred to those counts which will sustain it, and not to those which will not. And, accordingly, the judgment upon each defendant is, that “for his offences aforesaid,” he shall undergo a certain punishment. Now, what are “his offences aforesaid?” Surely not what is so imperfectly described as to amount to no offence at all, as is the case in the bad counts: surely not those findings of the jury, which are so independent of and extraneous to the counts to which they are intended to be applicable, that no judgment can be pronounced thereon, any more than on those counts which are bad in law; but what is contained in those counts and findings (and there are many such) upon which the Court might legally pronounce their judgment.

And what, I may be permitted to ask, is there which gives your Lordships to understand and be informed that judgment may not have been—actually was not—given exclusively upon those counts and the findings thereon, to which (according to the opinion of all the Judges at least) no possible objection applies? Why is it to be assumed that upon the erroneous parts of the record, or some of them, the judgment has proceeded, when (as has been too often already repeated) there are so many without objection?

It remains for me to make some remarks upon the supposed analogy between the present case proposed by your Lordships in this question, and a writ of error brought in a civil case, where there are one or more *bad counts in a declaration, and general damages given; a point much urged and relied upon at the Bar. It appears, however, to be clear that, upon examination, such supposed analogy will be found to fail. The reason why, in a civil case where general damages are given in the case just supposed, the judgment cannot be sustained in a court of error, is that the finding of the jury is the ground of error; not that there is any mistake in such finding, for the jury is not to examine the validity of the counts, but that it is impossible for the Court to know how much may have been given in respect of the good, and how much in respect of the bad, counts. Of this a court of error can have no knowledge, and has neither the means nor competence.

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of deciding ; nor the Court below either. But in a criminal case, with a finding of guilty, there is nothing which bears any resemblance to the damages found in a civil case. In a criminal case the verdict being guilty, and a judgment accordingly, the question is, whether there is upon the record enough to sustain the judgment. No question is raised like that of damages, as to which, belonging as it does to another tribunal, the Court can form no opinion, and has no means of deciding ; that is, how much is to be referred to the good counts in a declaration, and how much to the bad. In the criminal Court there is no foreign subject (if I may use the expression) into which the Court cannot inquire, but it may examine and decide whether, upon the face of the proceedings, there is enough to sustain the judgment. The Court below also has the power of assessing the amount of punishment, as well as of forming a judgment upon the validity of the indictment : not so in a civil case, for there neither a court of error nor the Court below can rectify an error that has *arisen from the finding on one or more bad counts of the declaration.

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Independently, therefore, of the opinion of Lord MANSFIELD already referred to, and passages of a similar import which are continually recurring, there are reasons why the distinction, which he twice over affirms to exist between criminal and civil cases, may be sustained upon sound principle.

My answer, therefore, to the third and eleventh questions proposed by your Lordships, is in the negative.

GURNEY, B. :

My Lords, my LORD CHIEF JUSTICE having delivered the unanimous opinion of the Judges, with their reasons, upon all the questions proposed by your Lordships, with the exception of the third and the eleventh, it remains for me to offer to your Lordships the opinion which I have formed upon the third and eleventh questions. As to the third, I think that there is not any ground for reversing the judgment, by reason of any defect in the indictment, or of the findings, or entering the findings, of the jury upon the indictment. With respect to the eleventh, I think that in the case put, the judgment cannot be reversed on a writ of error, and that it will not make any difference whether the punishment be discretionary or a punishment fixed by law. We are all of opinion that the fifth, eighth, ninth, tenth, and eleventh counts of the indictment, are good counts. The judgment of the Court of Queen's Bench in

Ireland may, I think, be well sustained upon those counts. The judgment of the Court upon each of the defendants is, "for his offences aforesaid." Now as to two of the counts, we are all of opinion that what is stated in each of them does not amount to an offence; therefore I think that it is not to be presumed that the *Court of Queen's Bench has given judgment upon those counts; on the contrary, it is to be presumed that it has not done so.

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It is unnecessary again to refer to the cases of *Rex v. Powell*, *Rex v. Mason*, *Rex v. Young*, which have been cited and dwelt upon more particularly by my brother WILLIAMS. We are of opinion that the findings of the jury upon the first four counts, which are good, are defective findings; but I do not think it follows that that invalidates the judgment upon the five counts which are decided to be good. Upon those bad findings, I think that it is to be presumed no judgment has been pronounced. I cannot distinguish between a bad finding on a good count, and a good finding on a bad count. They appear to me to amount to precisely the same thing; namely, that upon which no judgment can be pronounced. The judgment must be taken to have proceeded upon the concurrence of good counts and good findings, and upon nothing else. It has been contended at your Lordships' Bar, that inasmuch as there are some counts which are bad, no judgment can be pronounced upon those which are good; and this has been argued on an analogy which has been supposed to exist between civil and criminal cases. The distinction between one and the other has been always recognised, and the only regret that has ever been expressed upon the subject has been that such a rule should have prevailed in civil cases, by which justice has been so frequently defeated; but in criminal cases it has always been decided that if there be one good count, the Court is warranted in pronouncing judgment; and no case has been cited, or I believe can be cited, in which any Judge has ever suggested that the rule would be different in a writ of error from *that which has prevailed on motions in arrest of judgment. I should think that it would be a very dangerous thing to unsettle that which has hitherto been considered established law; that in criminal cases a judgment is valid where there is a good count to warrant it. It has been contended that the judgment of the Court must be taken to have been made up and compounded of so much punishment on one count and so much on another, as if it were two months' imprisonment on one and three on another, and so on; and that we ought

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to ascribe part of the punishment in this case to the bad counts or the bad findings. This certainly is not the mode by which any Court proceeds in fixing the punishment. The Court ascertains that there is a good charge and a good finding to warrant the judgment, and then it takes into consideration all the circumstances of the case ; those of aggravation and those of mitigation ; and it apportions the punishment to each defendant according to his demerit ; and therefore it may well happen (as in the present case) that, according to the greater or less degree of aggravation, the punishment of persons convicted of the same offence will vary ; to some will be allotted more, to others less. But this is not a matter for the consideration of the court of error. A court of error has no means of judging whether the punishment awarded is a just punishment, or whether it is too severe or too mild. All that a court of error has to consider is, whether the punishment be that which the law authorises for the crime of which the defendant has been convicted. In this case the punishment is appropriate. The offence is conspiracy ; the punishment is fine, imprisonment, and recognizance for good behaviour.

[285] ALDERSON, B. :

My Lords, the third question which your Lordships have directed me to consider in common with my learned brethren, consists of two propositions. The former of those propositions is repeated as a substantive question in the eleventh question ; and I shall therefore propose to consider these together, and then to advert to the second branch of the third question separately.

I own that I feel very strongly the paramount importance of that which I first mentioned, believing as I do that an opposite decision by your Lordships would be productive of great inconvenience and failure of justice in criminal cases for the future. It is therefore a great satisfaction to me to find that on this, which is a purely technical question, I agree with so large a majority of my learned brethren.

The universal belief of the profession, as long as I can remember any thing, has been in conformity to what is stated in *Peake v. Oldham*, *Grant v. Astle*, and *Rex v. Benfield*. The language of Lord MANSFIELD, in *Grant v. Astle*, expresses the universal belief and tradition of the profession ; and the invariable answer given to an objection in arrest of judgment on such a ground, has, according to my recollection, always been that it is immaterial to enter into

the discussion of the question, because there is a good count; "and the Court always" (as is said *arguendo*, and assented to by the Judges in *Rex v. Benfield*), "in indictments and informations, will give judgment on that part which is indictable." If we were to examine our records we should find, I doubt not, a cloud of cases in which a general judgment has been pronounced on an indictment with one or more defective counts; but it has not occurred that any such objection has *ever been made the ground of an argument in a court of error: nay more, cases of writs of error are not wanting in which this objection, though on the very surface, escaped the notice of the most acute counsel and the most astute Judges. It is certainly possible that all this may be so, and yet the objection may be good, and a valuable, as it is certainly (to me at least) a new discovery. But although this question has been most ably argued, indeed with that *nimia subtilitas* of which Lord Coke speaks, but not I think with much commendation, yet the argument has failed to convince me that all this course of precedent and tradition is erroneous.

It is not, indeed, contended that the Court below in such a case cannot pronounce a valid judgment; on the contrary, if it was not to pronounce a judgment against the defendant, that would be erroneous; but it will follow from the argument that the Courts are always bound to hear and to decide on the validity of each count, and that those Judges who have said and thought that it was immaterial so to do, have deceived themselves and the profession; for they contend that it is an objection valid in a court of error, although not ground for arresting the judgment. Now, a defendant in a case of misdemeanor may always go to a court of error for redress; and if he does so, it must appear, according to this argument, in express terms on the record, what the judgment of the Court below on the validity of each count has been. And a defendant, consequently, in all cases is to have this benefit given to him, that if there be any doubtful count he may say nothing in the Court below, but leave the Court to give its judgment; and then, if on suing out a writ of error, the court of error should think the count bad, it must reverse the judgment of *the Court below, and let him go free altogether: and he is to have this further advantage, if he argues the question, of taking the chance of total escape, by reason of a difference of opinion between the court of error and the Court below on some immaterial count, and even, perhaps, if the court of error should think a count good which the

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Court below has deemed bad; and though both agree that the defendant ought to be punished on the whole record, he is to escape altogether from that indictment: so that the Court will be obliged in all cases to examine and decide upon the record, in some cases even without the benefit of an argument, in order to avoid the risk of a reversal of its judgment; in cases, too, in which all would agree that the judgment as given ought not to be varied, even as to the amount of the punishment. For punishment differs from civil damages in this; that it is imposed in respect of all the facts, whether formally laid or not, and even upon all the surrounding circumstances, character, and conduct of the defendant.

Before I come to such a strange conclusion, I think I ought to examine carefully what the principles of law are, and what the authorities are by which it is to be supported. I believe no authority has been suggested; but the argument mainly turns, 1st, on certain inconveniences supposed to be likely to arise to defendants in certain imaginary cases, if what I consider as the old rule be retained; 2ndly, on some supposed analogy between civil and criminal cases; and 3rdly, on the true construction, as it is said, of the words of the judgment on the record. I will consider these very shortly, in their order.

I am not insensible that some of the difficulties stated are real; and if the rule of the criminal law applicable to such cases must of necessity be a perfect rule, admitting of no anomalies, and in no supposable *case of inconveniences, the argument is well founded. Pardons on the verge of impossibility, pleas of *autrefois convict* in very complicated and improbable circumstances, and the like, may easily be suggested by fertile minds, drawing upon an imagination at once of a poet and a pleader, for their facts. I will not go through these at length; it has been done already by many of my learned brothers. My answer to them all is this: the law proposes not a perfect rule, but being human, and therefore imperfect, must choose between conflicting inconveniences; and I think, in the rule which it has adopted, it has chosen the least. Then, secondly, is there any analogy between civil and criminal cases? There is no doubt that in civil cases the law is, and we have seen that Lord MANSFIELD lamented that it was so, that where there is a defective count and general damages, no judgment can be given on such a verdict. It is the duty, in such cases, of the Court to award a *venire de novo*, that the mistake may be corrected. If it should not award a *venire de novo*, but give judgment for the damages, the court of error will reverse that judgment, and will award a *venire de novo*. This was

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done in *Angle v. Alexander* (1). But this plainly depends upon this principle,—which I deem to be the true principle on which a court of error should always proceed,—that the court of error there clearly sees that the Court below has given a wrong judgment. The Court must know that upon such a record the damages were given upon the bad, as well as on the good counts; for damages are found by the jurors who have no jurisdiction to consider the validity or invalidity of the counts, but must treat all as valid. Secondly, the court of error corrects the judgment *of the Court below, and gives the judgment which the Court below ought to have given. In criminal cases both these important circumstances are wholly different. There the Court which awards the punishment has jurisdiction to say whether the counts are valid; and the court of error does not perform the analogous act of sending back the case for a fresh and proper judgment by the Court below, but altogether reverses it, and discharges the prisoner from the pending indictment. There is no resemblance, therefore, between the two proceedings. The course in civil cases is reasonable and just, but if applied to criminal cases would be unjust and unreasonable.

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I have said, that I think the true principle in all cases of error is, that the court of error shall clearly see that the judgment of the Court below is wrong, before it sets that judgment aside.

And this brings me to the third and the main point; which is, whether on the true construction of the words of the record, that does clearly appear; if it does, it should be set aside. The material words of the judgment of the Court are, that the defendant, “for his offences aforesaid,” do suffer such a punishment. Now what is the reasonable meaning of the words “for his offences aforesaid,” in a criminal record? The course of the Court, as stated in *Rex v. Benfield*, is to give judgment on the part which is indictable. The *dicta* in those cases where the motion in arrest of judgment is made, go to this extent: that it is immaterial and unnecessary to decide whether the count objected to is good or bad, because the Court always gives judgment on the good counts. All these are sensible and consistent, if we construe the words “for the offences aforesaid” as meaning “for those charges in the indictment which are offences;” but *are wholly insensible and wrong, if they mean “for all the charges, good or bad, in the indictment.” I therefore construe these words according to those *dicta*, and according to the universal tradition of the profession as to criminal law: and this is according,

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also, to their natural meaning; for a count which is bad, is so because it charges no offence. If so construed, there is nothing in the record to show more than this: that the Court below has decided that some counts of the indictment do contain offences, and that for those offences it has inflicted the punishment. Then the court of error examines the record; and if it finds that there are such counts, and that there are proper findings of the jury applicable to them, it is impossible, as it seems to me, that it should clearly see, or indeed see at all, that the Court below has made any error. If so, must it not affirm the judgment?

But then it is said, this mode of statement, if thus construed, will be too general a statement of the judgment of the Court below. The defendant cannot clearly see what he is punished for—on which counts, and the like. But this generality has been according to the course of the precedents in such cases, and it is reasonable to adopt it,—that such monstrous inconveniences may not arise, as that a defendant, properly punishable in the opinion of both Courts, should, by reason of a diversity of opinion as to a matter of formal statement, escape judgment on the pending indictment altogether. The precedents are so, the convenience is in accordance with them; why should we alter the practice? That the precedents are so, and that no one ever imagined such an objection was tenable, appears from the cases of *Rex v. Powell*, *Rex v. Mason*, and *Rex v. Young* and others. In *Rex v. Powell* there *were two counts; one which would support the judgment, the other not; for the judgment was of a peculiar species of imprisonment, viz. imprisonment with hard labour; all the punishment consisted of that sort of imprisonment. Now, the count for the common assault would not justify any judgment for laborious imprisonment at all. Nothing, therefore, can support that judgment, except the general principle that the court of error will confine the statement on the record, if susceptible of it, to a construction which will support the judgment, and that where there are a count and a verdict thereon which will support the judgment, it is quite enough; and it is clear the Court must have construed the general words of the judgment in the way before suggested, in order to do so in that case. The case of *Rex v. Young* and others (1), was a writ of error: there the indictment contained four counts; the two last were admitted to be bad on the authority of *Rex v. Mason*, which was cited, and was precisely in point; yet there the judgment, being in general terms, was held sufficient.

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Mr. Fielding, who argued it very elaborately, and the Court of King's Bench, including Lord KENYON and Mr. Justice BULLER, no inconsiderable names, never dreamt of this objection. The whole gist of the argument was to get rid of the two first counts, which were ultimately held to be good. This is almost an express decision on the point. It is impossible to believe the objection, if valid, could have been overlooked. If Lord KENYON had there said, when the counsel cited *Rex v. Mason*, in order to show the two last counts to be bad, "That is quite true, those counts are bad; but you know the general words of the judgment apply to the good counts alone;" and then *had affirmed the judgment, it would have been an express decision in point. I think the silence of the Court and Bar on the subject, speaks even with a louder voice to the same effect. *Rex v. Mason* (1) is to the same effect, though not so strong an authority. *Mr. Marryat*, no unacute or inconsiderable lawyer, begins his argument thus: he says "The second count is clearly bad." But he does not rest there, as he might have done, but proceeds to demolish the remaining count, and upon that alone argues for the reversal of the judgment: that also was a case of error. In both these last cases the punishment was discretionary, either imprisonment for a limited term or transportation; and the remark is obvious, that the bad counts, if acted on, may have caused the Court below to fix upon transportation rather than imprisonment.

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It seems to me, therefore, that these precedents, as well as the *dicta* before referred to, afford a clear and plain exposition of the general words of the judgment of the Court, "for his offences aforesaid," conformable to that before suggested by me to your Lordships; and further, that such general words so construed are quite sufficient in criminal cases to support the judgment of the Court below upon a writ of error.

I shall only detain your Lordships for a short period on the second branch of the third question; which, although of great importance in this case, is not of that general interest which the other is. It depends on the peculiar findings of the jury here; and probably such a question (as it has never, that I am aware of, occurred before) will never occur again. Nevertheless, I think it must be governed by the same principles and must receive the same solution as the other *branch of the question. It depends, as that did, on the reasonable construction of the words of the judgment, which are these: "That the defendant, for his offences

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aforesaid, be imprisoned," &c. If I am right in saying that, according to the true construction of the words, "the offences aforesaid," your Lordships must take them to mean "those charges in the indictment which are offences," then I think that the words "his offences aforesaid," (which are those of the record in his case,) must mean "those charges in the indictment which are offences, and which are sufficiently found against him by the jury;" otherwise, though they may be "the offences aforesaid," the counts being good, yet they are not "his offences aforesaid," not being so found by the jury as to warrant a judgment against him on the record. And I think the same reasonable construction ought in both cases to be put on the words of the record; for I see upon the whole no solid distinction between a charge properly found but informally stated, and a charge properly stated but informally found by the jury.

The principle, therefore, on which my opinion proceeds is shortly this: that a court of error cannot reverse a judgment upon a mere conjecture that it may be wrong, but must see clearly that the judgment below is erroneous; and I think, on the reasonable construction of the words of this judgment, expounded by the *dicta* of the Judges and the continued practice of the Courts, it is impossible to see with any certainty any error in it. I think also that the generality in the words of the judgment has been advisedly and properly adopted, and is recognized by the Courts, in order to prevent, what otherwise would happen and which is an opprobrium to the administration of justice, continual failures on points of mere form.

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I may add, that I think the punishment, whether it be discretionary or fixed by law, makes no solid distinction; but it is obvious that in the case of a fixed punishment, it would be more palpably inconvenient and strange to reverse it for such reasons as are now suggested, on a writ of error. My answer, therefore, both to the third and the eleventh questions, is in the negative.

PARKE, B.:

Upon the third question proposed by your Lordships, and also the eleventh, which may be properly considered at the same time, I regret to find that after a most anxious consideration of this subject, I cannot bring my mind to concur with the great majority of my learned brethren; entirely agreeing with all of them upon the other questions which your Lordships have been pleased to submit to her Majesty's Judges.

In order to decide this question we must assume that two of the counts of the indictment are bad, and charge no legal offence; that on three which are good there is an improper verdict of the jury, who have found parties guilty of more than one offence on counts charging one only; and that the remainder of the counts, and the findings on them respectively, are good. On one count, the fourth, there is the same defect, but it is cured by a *nolle prosequi*, and therefore it becomes unnecessary to consider it.

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In this state of the record each defendant is, in the language of the judgment, "for his offences aforesaid, fined, imprisoned, or sentenced to find sureties of the peace," for a certain time. The third question is, whether a judgment in this form ought to be reversed.

I had certainly considered it to be a settled rule and well established, ever since I was in the profession, *that there was a distinction between judgments in civil and criminal cases, where there were more counts than one, and one count was bad, and a general finding by the jury; that rule being, that in civil cases the judgment for the damages found would be erroneous; in criminal cases a judgment warranted by any one good count would be good: my impression being, that as the reason of the rule in civil cases was, that the jury not being presumed to know the law, were to be supposed to have given some damages on the bad count, which the Court had no means of apportioning; so in criminal cases the reason was, that the Court being presumed to know the law, was to be supposed to have given its judgment on the good count only. I may say that it certainly was with some surprise that I heard that proposition disputed at your Lordships' Bar. The full consideration of the able arguments I have heard on that subject has induced me to doubt extremely whether the rule is correct to the extent I have stated it, and whether it has not been carried too far by a misunderstanding of the *dicta* of Judges on applications in arrest of judgment.

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If this point were to be considered independently of the understood rule upon this subject, and supposing that no such rule existed, I should say, that where an indictment contains several counts, each ought to be brought to its proper legal termination by a proper judgment. The practice has grown up, and much increased in modern times, of introducing many counts into one indictment; and though we know practically that these are most frequently descriptions, only in different words, of the same offence,

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they are allowable only on the presumption that they are different offences, and every count so imports on the face of the record, as Mr. Justice BULLER states in *Rex v. *Young* (1); though the late Mr. Justice TAUNTON intimated a different opinion, I think without sufficient ground, in *Rex v. Powell* (2). The question then being how these counts are to be dealt with on the face of the record, I should have said, *à priori*, that it was the duty of the Court acting between the Crown and the accused, and the right of the accused, to have the charge of each offence (for as such I must treat it) properly and finally disposed of on the record, so that the accused as well as the Crown might know for what offence the punishment was inflicted, and for what not; and so that the accused might plead his conviction in bar of another indictment for the offence for which he was punished, and that the Crown might also know that it might again prosecute for that offence for which he was not. Therefore, in this case, where some counts are bad, the Court, I should have supposed, ought *ex officio* to have given judgment that they were so, and quashed them: Hale (3); by which the Crown would have been enabled to prosecute again for those offences, and the defendant would know that he could not plead his conviction of them. So in respect of those counts on which the jury have acted incorrectly, by finding persons guilty of two offences (on a count charging only one), if the Crown did not obviate the objection, by entering a *nolle prosequi* as to one of the offences: *Rex v. Hempstead* (4), and so in effect removing that from the indictment, the Court ought to have granted a *venire de novo* on those counts, in order to have a proper finding; and then upon the good counts it should have proceeded to pronounce the proper judgment. In short, I should have said that the defendant should on the *face of the record be put precisely in the same condition as if the several counts had formed the subject of several indictments.

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But in the case of a certain description of punishments, which from their very nature can only be once inflicted, that of death and transportation for life for instance, the record might be formal and sufficient without a judgment expressly given on each count, if for all the offences, in different counts, one judgment was given; because to put on the record a judgment that a person should be hanged or transported for life more than once would seem to be superfluous, and to savour of absurdity, and therefore in such a

(1) 1 R. R. 660 (3 T. R. 106).

(2) 2 B. & Ad. 78.

(3) 2 Hale, P. C. 396.

(4) Russ. & Ry. C. C. 344.

case the judgment might be good ; it would be considered as given, from the very nature of the punishment, for each and every offence ; and the insufficiency of one count, or the improper finding upon it, would in no way affect the judgment. Each offence would on the face of the indictment be finally disposed of ; and though on the bad counts it would be the more correct course to give judgment that they should be quashed for insufficiency, the want of that would not vitiate the record ; the accused would have been convicted, and received judgment on all ; and if for any one offence contained in a count which is insufficient in point of law he had received a judgment, it would have been no hardship, as precisely the same judgment, and exactly to the same extent, would be justified by another good count. And so, where the punishment was discretionary, and the form and language of the record admitted of a construction by which the judgment might be applied to each and every offence ; for instance, suppose for each of three offences the judgment was that the defendant should be imprisoned one year, beginning and ending at the *same time, such a judgment would not be defective ; each offence would be disposed of by the judgment, and the defendant might plead *autrefois convict* to any subsequent indictment for any one of the offences, and there would be no absurdity in one and the same imprisonment being a punishment for different offences ; and the effect would be in such a case, that the pardon of the Crown for one offence would not operate as a discharge of the imprisonment ; the defendant would still remain imprisoned on the others ; and the same observation would apply to the cases of fixed statutory punishments by imprisonment or transportation for instance, for a limited period, where the statute did not make it obligatory to inflict such separate fixed punishment for each separate offence.

Such, my Lords, is the course which would have appeared to me to be just and reasonable, and to be required by law, if there had been no authority on this subject ; and applying these principles to the present case, I should have thought the judgment, in the form in which it is entered on the record, erroneous ; because that judgment imports that it was given for all the offences charged against each prisoner, that is, upon all the counts ; some part of the punishment would be awarded to each, and two of the counts are bad, and three have had no finding of the jury upon them, which would, in the present state of the record (no *nolle prosequi* being

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entered as to part found on them), warrant any judgment upon those counts ; so that, according to the language of the record, the defendants have received sentence for five different offences (for so they must be assumed to be) for which they are respectively not liable to receive judgment at all ; and a court of error cannot say how much of the fine and how much of the imprisonment *belongs to each offence, and, the punishment being discretionary, clearly cannot itself pronounce any judgment.

Two modes suggested themselves to me, by which this apparent error could be rectified. The first is, that the court of error is to presume that the Court below has given judgment on those counts of the indictment only on which it was warranted to give judgment, viz. on the good counts, with sufficient findings thereon. The second, that the judgment may be read as one of the same imprisonment and the same fine, for each offence. To the first of these modes of supporting the judgment, there are two objections ; one, that the supposition does not accord with the terms of the judgment. If the judgment had been general, "therefore it is considered that the defendant be imprisoned," this objection would not have been of weight ; but it is, "that he be imprisoned for his offences aforesaid ;" that is, all the offences. It may then be said, that it is to be intended that the Court took into consideration only what were legally offences ; that is, the good counts. But then it has also given judgment upon the good counts on which there has been no proper finding, and judgment for the offences found by the jury, not included in the counts at all. The answer offered to this objection is, that it is to be presumed that it has given judgment for those "offences" only which are such by law, are contained in the indictment, are legally described in it, and sufficiently found by a jury to warrant the judgment. I cannot help doubting, to say the least, whether such a qualification, or rather addition, to the language of the record, could be permitted.

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But, secondly, the other objection is, supposing the terms of the judgment general, without the words *"for his offences aforesaid," so that no violence would be done to the language of the record, by adopting the presumption that the Court acted on the good counts properly found only ; the defendant would still be without the benefit, to which I have supposed that he was entitled, of knowing, on the face of the record, for which of the charges therein he was punished, so that he might plead *autrefois convict*.

As to the ingenious argument of *Mr. Peacock*, at your Lordships' Bar, that if pardoned for one offence, he could not tell how much punishment should be remitted, I think the answer is, that it would prove too much, for it would equally apply to an indictment with all the counts and findings good, and one sentence of fine or imprisonment for all: an objection wholly untenable. But with reference to the other argument, the defendant's condition as to future prosecutions (always bearing in mind that the offences are assumed to be different), if this presumption of supporting the judgment is to be adopted, the defendant must ascertain which count is probably bad and which good, before he pleads such a plea; and he must then refer to the Court before which he pleads it, whether that count was bad or good; a point which the first Court, I think, ought itself to have decided; for the plea of *autrefois convict* would on this presumption be bad or good, accordingly as the second Court decided the count to be bad or good, the first having given no decision upon it. It appears therefore to me, that there are very weighty objections to the adoption of the principle that the Court is to be taken to have given judgment on the good and well-proved counts only.

The second mode of supporting the judgment is by reading it as if it had been a judgment of the same imprisonment for a year, and the same fine for *each and every offence. If this could be done, each and every count would have been brought to its termination by a judgment thereon; and though the judgment on the bad counts and those insufficiently found would be erroneous, the judgment therefore could not be reversed. The good counts would equally support the judgment given, to its full extent. The objection to this mode is, that it alters the language of the record, by making the imprisonment and fine a punishment for each offence, instead of both; and that it cannot be supposed, without express words (whatever may be said about the sentence of imprisonment), that the Court intended precisely the same sum to be a fine or satisfaction to the Crown for each and every offence. *Primâ facie*, at least a part must be for one offence, and a part for another; and the court of error cannot apportion it, for it does not know the facts in respect of which it is imposed. Independently of authority, therefore, I should upon principle, and for the reasons I have mentioned, not have been satisfied as to the validity of the judgment in point of form.

It remains to consider what the authorities are. There is no

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decision on the subject; if there had been, it would probably have disposed of the question at once. But, undoubtedly, there is a prevailing opinion, that any one good count well found will support a judgment warranted by it, whatever bad counts there may be; the value of which opinion depends greatly upon the frequency of its being practically called into operation. This opinion, no doubt, is acted upon in practice to this extent, that judgment is continually passed upon a record containing many counts, without adverting to any count in particular, upon the supposition that any one count will support the verdict; *but such judgment is never entered formally on the record, unless the record is wanted for a special plea of a former conviction (a rare occurrence), or for a writ of error, which is not frequent, and the question relates to the form of the record. There are also some precedents which afford evidence of the practical operation of this opinion; for in those it may be reasonably supposed that the objection would have been taken, if such opinion was not fully established. And this consideration induces me to pause, and to doubt whether I ought to answer your Lordships' question in the affirmative. I cannot help thinking, however, that the opinion has grown up, without adequate grounds for it, from the application of the acknowledged difference between criminal and civil cases on a motion in arrest of judgment, in which the doctrine is clear to cases of error; and the latter being comparatively rare in criminal cases, the profession has not been sufficiently called upon practically to consider the difference. Add to this, in all capital cases, and in all in which the punishment could only once be inflicted, as transportation for life (if I am right in the view I have taken), the sentence would, from its very nature, be ascribed to each and every count, and therefore the objection that one was defective could not prevail; and by consequence the number of cases in which the doctrine would have to come under practical consideration would be much limited.

[His Lordship referred to and discussed *Grant v. Astle* (1), *Peake v. Oldham* (2), *Reg. v. Ingram* (3), *Rex v. Mason* (4), *Rex v. Young* (5), and other cases, and continued:]

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The result of this examination is, that I doubt whether the received opinion that, if any one count in an indictment is good and

(1) Doug. 730.
(2) Cowp. 275.
(3) 1 Salk. 384.

(4) 1 R. R. 545 (2 T. R. 581).
(5) 1 R. R. 660 (3 T. R. 100).

warrants the judgment, the judgment will in all cases be good on a writ of error, is so sufficiently established by a course of usage and practical recognition, though generally entertained, as to compel its adoption in the present case. I am fully sensible of the great importance of adhering to an established rule. If I had thought it fully established, I should certainly have abided by it, notwithstanding the serious objections which I have described; which are all, however, of a technical *nature, and the rule is practically productive of no real mischief to the prisoner, as in truth there is very rarely a charge in an indictment of more than one offence.

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The doubt which I have had and continue to have on this part of the case is, whether that rule is so established as to prevent me considering its propriety. After much anxious consideration, and weighing the difficulties of reconciling such a doctrine with principle, I feel so much doubt that I cannot bring myself to concur with the majority of the Judges upon this question.

The consequences of holding that one good count will not in all cases support a judgment, may be said to be, that a different and very inconvenient course will become necessary on criminal trials. I rather think that no great practical inconvenience will be found to result. In most cases of indictments with many counts, the defendant will be entitled, if the matter is attended to on the trial, to an acquittal on all but one; and where the verdict is on more, it will be necessary for the counsel for the prosecutor to examine the record, and take care that the judgment is not entered on a bad count, or ask a nominal punishment upon a count which is doubtful. The cases in which such a course will be necessary, will be rare.

I have now considered, I fear at too much length, both the third and (incidentally) the eleventh question proposed by your Lordships; and though I can by no means say that I am free from doubt, by reason of the prevailing opinion and the high respect I entertain for the opinion expressed by my brethren, I answer the third and eleventh questions in the affirmative.

TINDAL, Ch. J. :

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My Lords, I am desired by my brother COLERIDGE to express his very great regret that he is prevented from attending your Lordships to-day, by very severe illness; and he has begged me to say, that after hearing the arguments at your Lordships' Bar, and considering the questions, he concurs with the majority of the Judges

CONNELL in the opinion delivered by them upon the third and eleventh
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The LORD CHANCELLOR, on the part of their Lordships, returned thanks to the Judges for the great care and attention which they had bestowed upon this important case; and proposed that the further consideration of it should be adjourned to Wednesday, and that the opinions be printed: Agreed to.

Sept. 4.

THE LORD CHANCELLOR (LORD LYNDEHURST):

My Lords, after a careful attention to this case, I consider it to be my duty to move that the judgment of the Court below be affirmed. When the record was first presented at your Lordships' Bar it occurred to me, as I believe it did to every other noble Lord who had attended to these proceedings, that it was proper, from the nature of the questions and the other circumstances connected with the case, and in order to avoid all possible suspicion of political influence or bias in the decision of your Lordships' House, that the assistance of her Majesty's Judges should be required. Those learned persons were accordingly assembled by your Lordships' order. They attended with their accustomed patience to the long, elaborate, and able arguments urged at your Lordships' Bar. As soon as it was possible, consistently with their other duties, they met to *consult upon the matters addressed to their consideration; and after taking the time necessary to form a correct judgment upon the subject, they again attended your Lordships, and communicated, in the learned opinions which you have heard, the result of their deliberations.

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Upon all the points submitted to their consideration, with the exception of one question, or that which may be considered in substance as one question, their opinion has been unanimous. With respect to that one question, seven of the learned Judges, including the CHIEF JUSTICE of the Common Pleas, have expressed a clear and distinct opinion against the objections that have been raised. The two remaining Judges, for whose learning and attainments I entertain the highest respect, have given a contrary opinion, but an opinion, I may be permitted to say, accompanied with no inconsiderable degree of doubt and hesitation. I think, under these circumstances, unless your Lordships are thoroughly satisfied that the opinion of the great majority of the Judges is founded in palpable error, you will feel yourselves, in a case of this kind, bound to adhere to their judgment, and to act in conformity with it.

I shall begin by stating to your Lordships the nature of this question ; and after the full discussion which it has already undergone, I shall suggest to your Lordships, as briefly as the subject will permit, such arguments as occur to me in support of the opinion which I have formed.

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My Lords, the indictment in this case consists of eleven counts. A general judgment has been entered. Some of these counts are stated, by the unanimous opinion of the Judges, to be defective, inasmuch as they contain no charge of any indictable offence. With respect to other counts, there is, according to *their opinion, a defect in another respect, not from any insufficiency in the counts themselves, but on account of the findings of the jury, and the entering of such findings upon them. The question is, whether, under these circumstances,—there being some defective counts in the indictment, and with respect to other counts, defects in the findings of the jury, or the entry of such findings,—a general judgment can be sustained.

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Your Lordships will observe that this is a purely technical question ; a question, I admit, of importance, and which arises out of the manner in which the judgment has been entered on this record. In what I have to submit to your Lordships respecting it, I am afraid I can do little more, after the frequent discussions which the subject has undergone, than repeat the reasoning which has been already addressed to your Lordships, and which is so forcibly stated in the opinions on your Lordships' table. It is not disputed that hitherto it has always been considered as an undoubted principle of the criminal law of England, that in a case of this nature a general judgment is sufficient. Lord MANSFIELD lays this down in the most distinct and unequivocal terms (1). He draws a distinction between civil and criminal cases. In civil cases, he says, where a general verdict for damages has been found upon a declaration consisting of several counts, if one of those counts is bad, this is fatal. But with reference to the same point, namely, as to the effect of one bad count in criminal cases where there is a general verdict of guilty, he says, if any one of the several counts is good, this is held to be sufficient. In stating this rule, he at the same time expresses his regret that it should have been laid down *differently in civil cases. It is said that to this rule there is an exception, to which I shall presently advert ; but no such exception is stated or hinted at by that eminent Judge. He states the rule

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(1) *Grant v. Astle*, Doug. 730.

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REG. in the most broad and general terms. This is not to be considered as the opinion of that learned Judge alone. He sat upon the Bench with some of the most able Judges that ever adorned the tribunals of this country. It was an opinion expressed in their presence, and must be assumed therefore to have been with their concurrence. That it was not an opinion hastily formed is obvious from this circumstance, that upon a subsequent occasion, in another case (1), he again stated the same doctrine in the same comprehensive terms, and without any exception or qualification whatever.

I consider this, therefore, to be a general and settled rule; and from the first moment of my entering the profession, down to the time when I heard the point debated at your Lordships' Bar, I never knew it called in question. I have found it constantly acted upon without doubt or hesitation. I find it so stated in every treatise on the criminal law; not limited in the manner my noble and learned friend I see would suggest, but stated as a general and settled rule. Now for the first time it has been contended (and I have the authority even of those who dissent from the opinion of the majority of the learned Judges for this statement)—for the first time it has been maintained at your Lordships' Bar, that the rule does not apply to writs of error, but is confined to motions in arrest of judgment. I never before, in the course of a pretty long professional life, heard of such a distinction. I am sure there is no decision to warrant it; no authority that can be cited in support of it. The learned *Baron of the Exchequer (2), whose opinion is at variance with that of the majority of his brethren, said he was surprised to find it called in question. I confess I shared in that surprise; and I am satisfied, after all that I have heard, that there is no ground for the doubt that has been suggested, or for the distinction which has now, for the first time, been attempted to be established.

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It is not immaterial to advert to the practice of the Bar in cases of this nature, because it affords the strongest evidence of what is the general understanding of the profession upon this subject. In a civil case, the counsel for the plaintiff, when the jury have delivered their verdict, are cautious in entering the verdict, taking care that it is not entered upon a bad or doubtful count. No such caution is exhibited in a criminal case. How is this to be explained? Are the parties less interested? Are the counsel less anxious in a criminal than in a civil proceeding? Far from paying

(1) *Peake v. Oldham*, Cowp. 275.(2) *Parke*, B.

any attention to the mode of entering the verdict, it is entered as a matter of course, without any regard to the sufficiency or insufficiency of the counts; and for what reason? Evidently because it has always been considered in the profession that any number of defective counts in the indictment cannot affect the judgment, provided there be one good count in the record to sustain it.

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Now, my Lords, what is stated as the ground for the exception? It is said, How can you be certain that a part of the punishment has not been awarded in respect of the defective count? and the case is likened to that of a civil action where general damages are awarded. The distinction is this: in a civil action, where general damages are awarded, some portion must be assigned to each count; and as the damages *are awarded in an aggregate sum, the Court, when there is a defective count, cannot tell what portion was allotted in respect of such count; it has no means of apportioning them to the particular counts, and therefore, of necessity, the judgment must be arrested; or, if it has been entered up, the judgment must be reversed.

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But this principle does not apply to criminal cases. It is not necessary that the punishment, or any part of it, should be assigned to every particular count. It constantly happens that the same substantive charge, with some slight variation in form, is repeated in two or more successive counts. There is therefore no such rule, nor can any person who is not in the confidence of the Judge be certain, where the punishment is discretionary, by what the extent of the sentence was regulated. The only thing necessary is, that it must be warranted by the record. There must be a sufficient charge, and a sufficient finding on such charge, to sustain it; and as on a writ of error you cannot go out of the record, or call in aid any fact which does not appear on the record itself, you have, in the case of a defective count, no means of knowing from the record that any part of the punishment was awarded in respect of the charge contained in such count. This, therefore, bears no resemblance to a verdict for general damages in a civil action, where some portion of the damages must be assigned to each count, which the Court has no means of apportioning; and where, therefore, if one count be bad, the judgment must, of necessity, be erroneous. It was observed by one of the learned Judges, and justly, that if you reverse a judgment because you assume that the punishment, or a part of it, was founded upon a count which is defective, you may, after you have so done, find that the Judge had taken

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REG. defect, in making up his mind as to the extent of the punishment
 [*313] which he felt it his duty to inflict. In a writ of error, the judgment
 can be reversed in those cases only where the error committed is
 clear and manifest; you cannot proceed upon conjecture.

But, independently of these considerations, let me call your Lordships' attention to the effect of the record in this case; which will, I think, satisfy you that there is no ground for this objection. It is a rule that upon a writ of error the Court can look only to the record, which must be construed according to its legal effect. Nothing can be taken notice of that does not appear or is not deducible from the record itself. The whole subject is technical, and must be technically treated. Now the judgment is, that the party, "for his offences aforesaid," shall be fined and imprisoned. What, then, are "the offences aforesaid?" They are the offences properly charged and properly found in this record. Two of the counts are defective. They are defective because, in the opinion of the learned Judges, they contain no charge of any offence. There are various allegations in those counts, but they do not constitute any offence known to the law. When the judgment, therefore, refers to the "offences aforesaid," it must, according to every rule of legal interpretation, relate only to those counts in which some legal offence is stated, and cannot be considered to include those which contain no such charge. It would be a manifest inconsistency to construe the record otherwise.

This view of the case appears to have made a considerable impression upon the learned Baron to whom I before referred. He did not, however, attempt any answer to the objection, but con-
 [*314] tented himself with *passing to the other counts upon which the findings of the jury were defective; evidently considering that those counts would be sufficient to support a judgment of reversal. But I apprehend the same result will follow from these defective findings as from the defective counts. It was stated as the unanimous opinion of the Judges, and I entirely concur in that opinion, that the erroneous findings of the jury, and the erroneous entry of such findings, are altogether void; that they are to be considered as no findings, and that a good count, upon which there is no finding, is in its effect the same as a bad count upon which there is a good finding; it is a mere nullity; that when judgment is given against a party for his said offence, it is given for an offence of which he has been found guilty, and that he has not

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been found guilty upon those counts upon which the entry of the findings is erroneous. The argument, therefore, that applies to the defective counts, applies equally to these counts; and when the judgment is awarded for "his offences aforesaid," it must be confined to those counts in which offences are charged, offences in the view of the law, and to those counts in which the party has been found guilty of the offences charged against him; namely, those counts upon which the findings have been properly entered.

This, my Lords, is the only conclusion that can be deduced from this record. If the record is to be construed according to its legal effect (and this is the only way in which it can be properly construed), it must be considered as containing an award of judgment only for those offences which are properly laid, and those offences of which the party has been found guilty by a jury. The result therefore is, that the judgment is, in these respects, consistent and correct.

But, independently of these considerations, what are the authorities upon this subject? When your Lordships come to consider them, you will, I think, be of opinion that they are conclusive. The first to which I shall refer is of modern date, and I shall shortly call your attention to it. It is the case of *Rex v. Powell* (1). In order to show the application of that decision to the present case, I must state the substance of the record. The party was indicted for an assault,—this formed one of the counts in the indictment; there was a second count, in which he was charged with an assault accompanied with aggravated circumstances: this constituted the whole of the record. When the judgment was entered up, it was entered in this form: "Guilty of the misdemeanor and offence aforesaid." The judgment corresponded with the verdict, awarding two years' imprisonment and hard labour, for the misdemeanor and offence aforesaid. A writ of error was brought, and this objection was raised: it was said that it appeared upon the record that the party had been found guilty merely of the misdemeanor and offence aforesaid; which imported only one offence, whereas there were two offences charged in the indictment, and it was therefore uncertain to which the verdict applied; and as the punishment justified by one count would not be justified by the other, this was stated as a ground of error.

Now what was the answer given to this objection? The answer was that the word "misdemeanor was *nomen collectivum*, and

(1) 2 B. & Ad. 75.

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therefore the jury had found the party guilty of the whole of the offences stated on the record ; the offence stated in each of the counts." The judgment also was in the same form, and the *Court was of opinion that the finding and judgment were correct. What then was the result of this decision ? There was, in effect, a general finding that the defendant was guilty of the offences stated upon the record. One offence would warrant the judgment that was pronounced ; the other would not, because it was a judgment of hard labour, and a judgment of hard labour could not be given for a common assault. The very question that we are now considering was thus raised. The very objection that is now made might have been taken upon that occasion ; namely, that here was a general judgment, and that general judgment was only warranted by a part of the record ; and that the rest of the record, the finding being general, would not warrant or support it. It is said the objection was not taken ; which was the answer given, I think, by the learned Baron. But, my Lords, the objection was upon the very surface. And who were the Judges of the Court where the writ of error was depending ? Lord TENTERDEN, a Judge of great experience in criminal law ; Mr. Justice LITLEDALE, an accomplished pleader ; Mr. Justice TAUNTON, and Mr. Justice PATTESON, learned and able men. Is it to be supposed that an objection so very obvious would not have been taken, either by the counsel at the Bar or by one of those distinguished Judges, if they had thought such an objection tenable ? It is impossible to get rid of the authority of this case in the way proposed by the learned Baron.

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Another case has been cited, *Rex v. Rhodes* (1), which was decided by Lord HOLT. It was an information for subornation of perjury. There were several assignments of perjury. An objection was taken at the Bar, after the verdict, that some of those assignments *were bad. What did Lord HOLT do ? He did not allow the question to be argued. He said, " It does not signify. If there be one assignment good, that is sufficient to support the judgment." It is said that this rule applies only to motions in arrest of judgment. But, my Lords, it would in that case have been the duty of the learned Judge to have heard the question argued, and to have given his opinion as to the alleged defects in the assignments, in order that when the judgment was entered up, it might not have been subject to reversal upon a writ of error. It is quite obvious,

therefore, that in refusing to hear the validity of the different assignments of perjury argued, Lord Holt must have considered that a general judgment upon the whole record, including the defective assignments, could not be reversed upon a writ of error. Such is, I think, the conclusion obviously to be drawn from this case, with respect to the opinion of that great and eminent Judge upon the point now in controversy.

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A third case, *Reg. v. Ingram* (1), has been incidentally referred to. That was a case upon a single count; a part of the count was defective; a motion was made in arrest of judgment; the Court decided that the defect was immaterial, as there was sufficient in the count to support the judgment.

In addition to these authorities, there is another class of cases upon writs of error themselves, all leading distinctly to the same conclusion. So much industry has been employed upon this subject that I do not believe any decisions can be found beyond those which have been already presented, either at your Lordships' Bar or in the opinions delivered by the learned Judges. The first of this class of cases is *that of *Young v. Rex* (2), upon error. The indictment charged the defendant with obtaining money under false pretences; it consisted of four counts; two upon the statute, which were sufficient, and two at common law, that were admitted to be altogether invalid. The judgment was entered up generally, upon all the counts, and a writ of error was brought. First, then, what was the course at the Bar? If what is now supposed for the first time to be the law, had then been conceived to be so, would the learned counsel, a man of great experience in criminal cases, the late *Mr. Fielding*, would he solely have endeavoured in his argument to satisfy the Court as to the insufficiency of the two counts upon the statute? He would have said at once, "Here are two counts confessedly bad: the record has been completed: judgment has been entered up, a general judgment upon the whole record: this judgment must, as a matter of course, be reversed." Was that the course he pursued? Far from it. He entered into a laboured argument for the purpose of proving that the two counts upon the statute were also bad. What was the result? The Court ultimately decided that the two counts which had been the subject of argument were good. Two of the counts, therefore, were determined to be good, and two were admitted to be wholly untenable. A general judgment had been entered up. This very

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(1) 1 Salk. 384.

(2) 1 R. R. 660 (3 T. R. 98).

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question must, therefore, have presented itself at once to the Court. Here are two bad counts, and a general judgment; how can such a judgment be sustained? Would so plain a point have escaped the learned counsel? But if he had overlooked it, would it have escaped the vigilance of the Court? Of whom was the Court at that time composed? It is sufficient to *say that Lord KENTON was the Chief Justice; and Mr. Justice BULLER, always distinguished as a most acute criminal Judge, was associated with him on the Bench. It never occurred to those learned persons that such an objection could be sustained. What is the answer attempted to be given to this case? It is said that the judgment was a judgment of transportation, and could only have been supported by the good counts. The observation is not a little singular, for it raises a further objection; since, according to the principle now contended for, if all the counts had been good the judgment would have been erroneous, because it could be sustained by only two of the counts. It is impossible, I think, to resist the effect of this decision.

There is another authority which occurred about the same time, not quite so stringent indeed, but tending in the same direction. It occurred, I think, the year before. I allude to the case of *Rex v. Mason* (1), also a case in error. There was a good count, as it was contended, and a count admitted to be defective. The case was argued by a gentleman whom we all remember, an acute lawyer, remarkably conversant with every technicality connected with the profession; the late *Mr. Marryat*. Instead of taking this objection, he confined himself, in a case of much difficulty, to labouring, with no little ingenuity and refinement, the question with respect to the validity of the remaining count; without any interposition on the part of the Court, or any attempt on his part to avail himself of the point which is now supposed to have been open to him, and to have been fatal to the judgment.

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There was a case in the time of Lord ELDON, I mean the case of *Rex v. Hill* (2), which, though treated somewhat lightly in the argument, is, I think, deserving *of your Lordships' serious attention. The prisoner was tried at the Assizes for obtaining money under false pretences; the indictment contained several counts; he was found guilty, and sentence was passed upon him. The judgment was general upon the whole record. The sufficiency of the indictment was reserved for the consideration of the Judges.

(1) 1 R. R. 545 (2 T. R. 581).

(2) Russ. & Ry. C. C. 190.

One of the counts was decided to be bad: so that in that case, a highly penal case, there was a general judgment with one defective count. A writ of error would therefore, according to the doctrine now contended for, have prevailed. What ought the Judges then, upon that supposition, to have done? After deciding the question as to the sufficiency of the count in favour of the prisoner, they ought, as a matter of course, to have recommended a pardon. They did not, however, interfere, and the judgment was carried into effect.

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These authorities must, I think, satisfy your Lordships of the correctness of the rule laid down by the learned Judges. It has received the sanction of Lord HOLT, one of the most eminent of our Judges; it has the express authority of Lord MANSFIELD, with the concurrence of the rest of the Court in its favour; it has been repeatedly confirmed since that period; and, although frequent opportunities have occurred for that purpose, it has never before been called in question, but has always been considered as a settled and established rule of law.

Some difficulties have been suggested, to which it is supposed the rule would give rise, and to which I shall for a moment advert. One was, the difficulty which might occur in the case of a pardon as to a part of the charge. It is not necessary for me to make a single observation upon this objection; because all the Judges, even those who dissent from the *majority, consider that there is nothing in it. This supposed difficulty would equally arise in the case of an indictment with several counts, where all of them were good. The argument, therefore, proves too much. There is no ground for the objection.

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Another point which was insisted upon, was the difficulty in which a party would be placed in pleading *autrefois convict*. This has, I think, received a satisfactory answer from the learned Judges. In cases of this nature the sole question is as to the identity of the offence. It is a question of evidence; viz., whether the *corpus delicti* of which the party was before convicted, is the same as that on which the second indictment is framed. That is a fact to be established by evidence. The rule will not be at all affected by the present case.

But it is said there has been no express decision upon the point in controversy; it is now for the first time presented for adjudication; it cannot, therefore, be considered as settled. If a question, then, be so clear, so well established, that no person, whether

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attorney, counsel, or Judge, ever entertained a doubt respecting it : if it has been uniformly acted upon, and constantly recognised ; is it to be said, because it has not been the subject of express decision, that it is therefore not to be considered as part of the settled law of the land ? The argument would lead to this singular conclusion, that the more free from doubt any point might be considered by the profession, the more uncertain it would become, because it would be less likely to be called in question, and less likely, therefore, to become the subject of any express decision. For many of the doctrines and principles which form part of the acknowledged law of the land, you would look in vain for any direct decision. Usage, *admitted practice, recognition, are evidence of what the law is. These are the foundations upon which the common law rests. It has been admitted throughout this case, that never, till the present occasion, has any doubt been expressed upon the question. It is stated by the learned Baron, that he had always considered it to be a settled and well-established rule, and that it was with surprise he heard it disputed at your Lordships' Bar. No case has been cited, no authority referred to, no *dictum*, no text-writer, for the objection which has now for the first time been contended for in this extraordinary case.

I earnestly advise your Lordships, therefore, to recognise and adopt the opinion of the Judges. On a question of this nature, a point of technical law with which they are every day and every hour conversant, when you find a great majority of those learned persons, with that eminent lawyer the LORD CHIEF JUSTICE of the Common Pleas at their head, pronouncing a distinct opinion, nothing but a case free from all doubt, a conviction amounting to certainty, can (may I venture to say it ?) justify your Lordships in rejecting such authority. It is on these grounds, for the reasons which I have stated, on the ground of the uniform recognition of this principle as an admitted principle, and from the confidence you cannot fail to place in the opinions to which I have referred, that I counsel you to resist this objection. I shall trouble your Lordships no further upon this part of the case.

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My Lords, with respect to the other objections, it is hardly necessary to say a word ; and for this obvious reason, that all the Judges have concurred in opinion that they cannot be sustained. To one of those objections, however, I shall very shortly advert, because I believe my noble and learned friend, the CHIEF *JUSTICE

of the Queen's Bench, entertains a strong opinion upon it. The objection to which I refer is that which relates to the jury; the challenge to the array. The Court below has decided that the challenge to the array cannot be supported. The Judges whom you have consulted upon this occasion, have come unanimously to the same conclusion.

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My Lords, if you look into our law books, you will find that the challenge to the array is only allowed on account of some objection arising out of the position or conduct of the sheriff or other officer by whom the jury is returned. If the sheriff is unindifferent—to use the legal expression—if he is not equal between the parties, that is a ground of challenge to the array. If he is guilty of any default in returning the jury, that also is the ground for this species of challenge. Those are the only grounds of challenge to the array. They are of a personal nature, and are confined to the sheriff or other officer, whoever he may be, by whom the jury is returned. But in this case, there is nothing on the record that imputes anything whatever to the sheriff. He is not stated to be unindifferent. He is not stated to have committed any fault. It is not suggested that he is not equal between the parties, or that he has been guilty of any misconduct. There is nothing, therefore, upon this record which, according to the law as laid down by our best writers, can give a right of challenge to the array. There is no warrant or authority for extending the challenge beyond the limits which I have stated. Suppose, as it was put by the learned CHIEF JUSTICE, the challenge to the array were allowed, the writ would, according to the established rule, be sent in that case to the coroner. What would the coroner do? He must take precisely *the same course that has been pursued by the sheriff. He could not deviate from it. It is said that if this book be defective, recourse may be had to the book of the preceding year. I am satisfied, upon the construction of the Act, that such a course would be impossible. When no book has been made up, then the Act gives a power to refer to and adopt the last preceding book. But when, as in this instance, a book has been made up, the case is not within the Act of Parliament, and you are not entitled to select the jury from the former book. It is further to be observed, that it is scarcely possible, considering the number of jurymen whose names are contained in the jury-book for the city of Dublin, to suppose that mistakes must not constantly occur; and the consequence therefore would be, if you were to proceed

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O'CONNELL. according to the course now suggested, that when you came to examine the former book, you would find that also defective, so as to render it necessary to go still further back, until you discovered a book, if possible, free from objection. It is obvious that such a course of proceeding would be wholly impracticable.

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But, we are asked, is there to be no remedy in a case of this nature? I am far from being satisfied that the Court might not have applied a remedy. If not, it is a defect occasioned by the change in the jury-law, and recourse must be had to the Legislature. The only question now before us is, whether according to the existing law, the challenge to the array can be applied in a case of this nature. Is this the remedy which the law has pointed out for a defect of this kind? I am satisfied that it is not; there is no principle or authority to warrant it. To decide in favour of the objection would be to make the law, not to expound it. I should not have addressed myself at all to this point, had it not been for the *sincere respect which I entertain for my noble and learned friend (Lord DENMAN). The learned Judges have pronounced an unanimous opinion upon it, corresponding with the decision of the Court below; and I must say, with all the deference due to my noble and learned friend, to his character and station, that I think no reasonable doubt can be entertained respecting it.

Passing, then, from this part of the case to the several subordinate questions upon which the learned Judges have expressed their unanimous opinion, I have no reason to think that any of my noble and learned friends differ upon these points from those learned persons; and I shall, therefore, not enter into any discussion upon them. [His Lordship here briefly referred to the question of discontinuance.] I pass over these points, because I consider the answer given by the learned Judges to be conclusive.

Then, my Lords, as to the plea in abatement, and the demurrer to that plea, no person at all acquainted with the rules of pleading in criminal or civil cases, can doubt that the plea of abatement is altogether vicious.

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Again, as to another point, a subordinate point, namely, as to the manner of swearing the witnesses before the grand jury: the Act of Parliament under the authority of which this was done, speaks of a general inconvenience, and it applies a general remedy; it makes use of the word "all;" and the only question upon the construction

f the Act is, whether its operation is to be limited because the terms are not equally comprehensive when the Legislature points out the mode in which the provisions of the Act are to be carried into effect. It is clear to me that it is not.

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My Lords, there are no other points that at present occur to me as requiring to be noticed. I have submitted to you the reasons why I think this judgment ought to be sustained. I am satisfied that you will, without difficulty, concur in the opinion delivered by her Majesty's Judges upon those points on which they are agreed; and I cannot bring myself to the conclusion, that on the remaining question, respecting which the great majority of the Judges have expressed a clear and decided opinion, and which has been met only with expressions of doubt and difficulty on the part of those who differ from them, that you will, in opposition to such a weight of authority, yield to those doubts, and give your sanction to the objections which have been raised against the judgment of the Court below.

LORD BROUGHAM:

My Lords, I must begin by expressing the great satisfaction which I have received from the able assistance given to this House by the answers of the learned Judges to the questions proposed to them. It was a fit and proper course to call in their assistance in disposing of this case. We *adopted that course without any regard to the supposed difficulty of the questions likely to be raised before us. Indeed, no knowledge had then been obtained by us that any matter of difficulty or nicety would arise in the course of the argument; but we called in the Judges because the cause was one of great public importance: it was a Government prosecution; it regarded an extensive conspiracy against the peace of the realm; above all, it was a political question, and one exciting great temporary interest among the parties which divide the country, and which also divide the two branches of the Legislature. Nothing, therefore, could be more desirable than that we should, as far as was possible consistently with our duty, call in the aid of the learned Judges, and ask them how the points of law which might arise before us would be regarded and dealt with by them sitting in their own Courts; those Courts from which are excluded all access to party feelings, whether of the one class or the other; and all bias, whether from popular influence or the authority of the executive power; those Judges who are placed by their exalted position and unsullied

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O'CONNELL character above any such vulgar control, who occupy unmoved and
 REG. serene those elevated heights,

“Despicere unde queas alios passimque videre
 Errare, atque viam palanteis quaerere vitæ.”

We have had the benefit of their help,—valuable in all cases ; in a case like the present, inestimable.

[*328] I agree, however, that we are not at all bound by the opinions thus given. We do not refer the question to their decision ; we only ask them how, elsewhere, and by other Judges than ourselves, of great learning and large experience, and perfectly free from *all bias, certain points would be regarded and disposed of ; and we take their answers not as our rule, or even as our guide perhaps, but certainly as entitled to the greatest attention, and as a most useful help to make our going over a ground, confessedly slippery, satisfactory and safe.

But I will go a step further ; because I have heard it said that precedents, which might bind a Court below, are not therefore binding on a court of error ; and it is suggested, that some points, never having been decided by such a Supreme Court, may now be determined and disposed of differently from their determination in Courts subject to our review. With this doctrine I am unable to go along. Admitting in its fullest extent the difference between a decision or a precedent in a Court whence appeal lies, and a Court of the last resort, I consider it as clear that the highest Court is bound to view with the utmost respect the practice, and the decisions, and the precedents in the Courts below, as evidence of the law which we as well as those Courts administer ; and only to overrule their decision when we find it clear, beyond all doubt, that they have mistaken the law. The difference is this between them and us ; between the Supreme Court, and a Court from which lies an appeal : they might be convinced that their own former decisions were erroneous, and yet might feel bound by their own precedents ; though cases are not wanting where they have got rid of those precedents and overruled them, but those are rare ; whereas we are not bound at all when we see manifest error in the precedents cited, any more than when we see manifest error in the particular case at Bar on which those precedents are brought to bear : but then our opinion must be quite clear that the error has been committed ; *else a uniform course of precedents must, generally speaking, be admitted to make the law to us, as well as to the Courts below. By a single precedent, a single decision, we might not be governed ; while they,

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generally speaking, would be. By a course of precedents, a course of decisions, and the long-prevailing opinion of the Judges and of the profession, we, as well as they, must be bound; and it would be very difficult to suppose a case of error so clear, so manifest, as would suffice to make us deviate from a course long and generally pursued by the Courts below.

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That such has been the opinion of the profession and of the Judges, and that so general and uniform has been the course of practice in the Courts of criminal jurisdiction of this country upon the most important question now before us, that raised by the third and eleventh questions submitted to the learned Judges, I feel it quite impossible to doubt. Here is a point, as it were a point of fact, upon which the best evidence we can have is the report on it of those learned Judges so long and so largely engaged in administering the criminal law; lawyers who, like the Chief Justice of the Common Pleas, have for 15 years sat upon the Bench; who, like another learned Judge, have been constantly engaged for 40 years in Courts of criminal jurisdiction; or, like a third learned Judge, for above half a century: all of these testify that the opinion of the profession, and in conformity therewith, the practice of the Courts, has been to consider a general judgment authorized by the law as good, which is given generally upon an indictment consisting of several counts, whereof one or more was bad, provided one or more be good; and that no difference can be taken between a case where the punishment is fixed by law, and one where it is left to the Judge's discretion. To this practice other Judges bear the same unequivocal testimony with those three whom I have cited. Those learned Judges agree in holding that the sentence pronounced is not to be taken as the aggregate amount of the several sentences on each one count, but as one sentence on the offence, differently charged in the different counts. Mr. Justice PATTESON says, that he believes this is the first time that a contrary notion has ever been ventilated; and he says, that the universally received opinion has been in favour of the proposition, or rather assumption (for it never was drawn into any controversy), that one good count would sustain a general judgment on the whole indictment.

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But it is material to observe that Mr. Baron PARKE himself, who dissents from the opinion of the great majority of his brethren, does not dispute this; indeed he seems in terms to admit it. Ever since he came into the profession, he says, the distinction between civil and criminal cases in this respect has been considered by him

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to be a well-established and settled rule. He adds, that it was with some surprise, certainly, that he heard the proposition disputed at our Bar in this case, for the first time in his professional life. Though he doubts the correctness of the rule to the extent stated, he does not at all deny or even doubt the existence of the rule; he only doubts whether it may not have been carried too far, by some misunderstanding of the *dicta* of Judges in dealing with motions in arrest of judgment.

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By the great majority of the learned Judges the existence of the rule is not merely admitted, indeed by all except Mr. Justice COLTMAN, who says nothing distinct on this point, but all, with two exceptions (most respectable exceptions doubtless), agree in holding the rule to declare correctly the law upon the subject. Mr. *Baron PARKE is the only one who, at great length, enters into objections against it. But it is to be remembered, that while the other Judges have given a clear and unhesitating opinion the other way, the learned Baron expresses himself with much hesitation, and in the form more of grave doubt than of a clear opinion. He says, no less than eight several times, that he doubts the position. His language is this: "I cannot help doubting, to say the least;" "I am inclined to pause, and to doubt whether I ought to answer the question in the affirmative." After going through the cases, he says, "The result of this examination is that I doubt whether the received opinion—that he admits to be the received opinion—is so established by usage, though generally entertained, as to compel its adoption in the present case." Again he says, "I feel so much doubt, that I cannot bring myself to concur with the majority of the Judges." Finally, he concludes by giving his own opinion in the negative; but adds, "I can by no means say that I am free from doubt," in consequence of the majority of his learned brethren differing with him.

Now it must be observed, that the fact of these doubts not existing in the opinion of the greater part of the learned Judges, gives that opinion a greater weight; and that the doubt expressed by the learned Baron, to a certain degree diminishes the weight of the authority of his contrary opinion.

The Judges have unanimously held two of the counts, the sixth and seventh, to be invalidly framed, and insufficient to support a judgment. I feel the greatest reluctance to differ with these learned persons, but I am bound to state the inclination of my opinion. Their arguments, as delivered by the learned CHIEF

JUSTICE, have failed to satisfy me that *an offence is not set forth with sufficient certainty and precision in these two counts. Perhaps I ought rather to say, that I retain so much doubt (taking the language of the learned Baron upon another point) as to feel unable to agree with them, because the Latin form of the word "frightening," or impressing with terror or fear, seems quite precise, and the object to be gained by such use of intimidation, or frightening or fear, seems to show against whom the fear must be intended to operate. A change in the Government and Constitution could only be obtained either from Parliament, or in spite of Parliament; if from Parliament, then the fear must be impressed on Parliament; if not from Parliament, then large meetings for obtaining such changes otherwise than by Parliament, whether with or without the use of terror, are unlawful. But I mention these as grounds of doubt, rather than of any opinion which I have formed; and when I find all the learned Judges, who have had so very much greater experience in courts of criminal jurisdiction than any I ever can have had, entertain a clear opinion the other way, I am bound to suppose that I am wrong in my doubts, and I can in no way set up my opinions against theirs; my inexperienced judgment upon such a point, against their experienced and clear opinion: and I should say the very same thing, if upon the other part of the case to which I have referred, that of the answer to the third and eleventh questions, I felt inclined to doubt with the learned Baron (who only doubts), when seven Judges hold a clear, undoubting, and unhesitating opinion the other way: I should certainly in that case have no confidence in my own doubts; and if called upon to look at the doubts of that learned Baron, I should set against these doubts, the clear, *and unhesitating, and undoubting opinion of his seven learned brethren.

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But it is wholly immaterial to what opinion I may have arrived upon the sixth and seventh counts, because the point stated in the third and eleventh questions, is sufficiently raised by the finding of the jury upon the first four counts being allowed to be bad; and I entirely concur in the opinion expressed by all the learned Judges, that these findings cannot be supported. My noble and learned friend reminds me that the *nolle prosequi* upon the fourth sets it right; but one is enough. Now it is clear that a bad finding upon a good count is equally incapable of supporting any judgment with a good finding upon a bad count. Therefore the point in the

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third and eleventh questions which your Lordships have put, is as well raised by the finding on these first three or four counts being held bad, though the counts themselves be good, as it is by the sixth and seventh counts being held bad, on which sixth and seventh counts the findings are not objected to.

I come, therefore, to the point, and the only point, of difference among the learned Judges; namely, that raised in these two questions, the third and the eleventh; and I have already stated the great difficulty which I should have on such a point as this, a practical point, in differing with the clear and unhesitating opinion of so large a proportion of the learned Judges; testified also, in common with them, by the learned Baron himself, to be the opinion of the profession, and one which has been acted upon by all the Courts. But my opinion, in fact, goes entirely along with theirs, and would be the same were I deciding the causes without their assistance.

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In approaching this question, the first thing which *strikes us, is that prevailing opinion stated by all the learned Judges as quite universal in the profession, and admitted to be so even by those who dissent from the conclusion at which their brethren have all arrived; insomuch that Mr. Baron PARKE cannot avoid recording the feeling of surprise with which his mind was impressed upon hearing its soundness for the first time questioned at your Lordships' Bar. But it is not merely the prevailing opinion against which we must run, if we declare that it is all error and delusion; the practice has been conformable to the opinion. Can anything be more desirable than that this practice should, if possible, be upheld and countenanced? Can anything be more undesirable than to declare it all wrong? I will go further: Can anything be more appalling than the course recommended to us, of declaring, by this day's judgment, that in all those cases without number in which, on a verdict with several counts, one whereof only is bad, sentences have been passed generally, and those sentences executed, every one of them must have been reversed and no execution done thereupon, had a writ of error brought them before the tribunal of the last resort? I must confess my insuperable reluctance to join in such a proceeding, and put forth such a declaration of the law. I must see far more clearly that all has been error and delusion below, before I can so declare it; I must see far more serious inconvenience as incident to the practice so established and so sanctioned, before I can consent to incur the inconveniences of such a reversal; and I must have more

than doubts, even grave doubts, on my mind, to justify such a step. And when I find the sages of the law, in whose hands its administration is now placed, pronouncing, by so large a majority of their number, *clear opinion, deliberately formed, that the universal doctrine is sound, and the general practice right, it is not because one of that number, how respectable soever, feels difficulty in concurring with them, and “cannot help doubting,” and is “induced to pause,” and then gives a doubting opinion the other way, that I can go along with him in pronouncing his learned brethren, and his equally learned predecessors, all to be in the wrong, and the practice of ages to be unsanctioned by the law of the land.

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But it is said that the opinions which these learned Judges themselves have expressed of the practice, and which their venerable predecessors have before them given upon this point, must be received with qualification. And, first, we are told that the case is so far new as to have never been decided, at least upon argument raising and supporting the point. On which I take leave to ask, how much of the known and admitted law of this country, in which the books abound and by which the Courts are guided, would be struck out and cease to rule us, were all struck out on which no decision has ever been formally pronounced? A doctrine may be without any decision to support it expressly, because it never has been denied; it may rest on no cases but on the common understanding of the profession, precisely because it never has been brought into doubt. Again, when it is said of some cases quoted, “the point never was made, the objection never taken,” I answer, first, that we now know what would have been its fate if taken. We have the majority of the Court here present, which decided some of those very cases; the objection has before them now been taken; before them argued; by them disposed of: and therefore it is no *speculation upon probability, but a positive fact, of necessity true, that if that very objection had, in those very cases cited, been urged before the Courts below, in those Courts it would have been overruled; and this remark with which I am now dealing, in impeachment of the authority of those cases, would therefore have been displaced.

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But I answer further, that whether taken at the Bar or not, really signifies nothing; for it was the bounden duty of the Court to take it, as the facts raising it lay upon the very surface, as my noble and learned friend has well observed; and it was their bounden duty to refuse affirming a sentence which was exposed to so

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manifest and patent an objection. They could not have affirmed the sentence without admitting that they themselves would have pronounced it, and that they themselves would have concurred in its legal validity.

But then it is said that this observation applies, in a certain degree, to decisions given upon motions in arrest of judgment only; and that these, standing upon a different footing from decisions on writs of error, have not the same weight as authorities.

Now I answer, first, that some of the cases to which I refer are upon writs of error, and not upon arrest of judgment; a topic to which my noble and learned friend has already referred: secondly, I answer, that I cannot go along with those who give no weight to the decisions on motions in arrest of judgment. I hold them as evincing, and as very clearly and very certainly evincing, the opinion of the Court on the point; as showing, and very clearly showing, that the same Court would have given the same judgment had the matter come before it in error on the record of the judgment, and not by way of motion to *arrest it. My reason is this; that I cannot conceive any course more absurd, and therefore more difficult, not to say impossible, for a Court to take, than the one which these Courts are by this argument supposed to have taken; nay, must necessarily be admitted to have taken, if the distinction now pressed, and with which I am dealing, is of any avail in the argument. For to what does it amount? Neither more nor less than to this; that the Judges, in refusing the motion in arrest of judgment, say, "We will not arrest the judgment, but we will pronounce a judgment which is naught, and which we know a court of error must reverse as a matter of course. We, in the King's Bench, will not arrest; but on the other side of that wall, the Court of Exchequer Chamber will reverse the judgment we give." Observe, the course taken on these motions is not said to have been, to refuse the arrest of judgment, but to admit the count to be properly objected to, and declaring it bad, to enter the judgment on the other counts. No such thing. The general course was, to keep the judgment entered generally, to refuse to alter the entry of the judgment, to refuse the motion, to confine the judgment to the good counts, and to refuse entering it upon the bad. The refusal of the motion for the arrest of judgment had the effect, or at least the intention, of keeping the judgment entered generally upon all the counts, because the ground of the refusal was, that arresting the judgment was useless, inasmuch as there were other good counts

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upon which it might equally have been given as upon the bad ones. Then the inference is irresistible, that the Court must have held this general judgment to be a judgment upon the good counts as well as upon the bad; on each and on all; or rather on each than on all; on *each severally, and not on all conjointly, a judgment severable and sustainable by the good counts to which it applied; and they must have held that it could not be reversed on error, else they must have granted the motion, and confined the judgment to the good counts. It is beyond all possibility of one's imagination to suppose that the same Court if sitting in error, that is the Court which dealt with the motion in arrest of judgment, and refused to arrest the judgment, that that same Court if sitting in error would not have given the very same judgment; that it would not have held the judgment good which they refused to arrest.

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Let it further be observed, upon this important part of the argument, that when motions in arrest of judgment have been refused, the Courts have never given a decision that the counts objected to were bad. They have only said, "Be it so; be they ever so bad, there are good ones, and that is enough; and therefore we will not arrest the judgment." Now in every case the badness was such as could not be denied. Then just consider what must be the course taken by the Courts, had the law, now for the first time propounded, been the law then acknowledged and received by them. The defendants had only to bring their writ of error the moment the judgment was entered up generally, as it must have been, because no decision was ever given to confine it, no decision was ever given to pronounce one count good and another bad, and to say which were the good counts and which were the bad,—and then that judgment on a writ of error so brought must have been reversed. But what was the fact? We know it is admitted on all hands that no writ of error was ever brought in any of those cases, before the present. Can any thing more demonstratively *prove that in every one such case such was the opinion of the profession; of the parties as well as of their advisers, and of the Courts too? It is not to be forgotten that we have the *dicta* of such venerable Judges as Lord MANSFIELD and Lord Chief Baron EYRE, distinctly recognizing the doctrine now first impeached; while it must be observed that we have no *dictum* on the other side, no opinion or authority of any text-writer quoted, and no case whatever cited to support that doctrine.

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The learned Baron objects to some of those cases; he expresses

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doubts whether others do not go further; all which cases and all which authorities are on the side against which he contends: but the learned Baron—admitting that all those cases, whatever weight they have, throw that weight into the scale against which he is contending—supports his opinion, perhaps I ought rather to say his doubts, by citing no case, by citing no authority, by citing no *dictum*, either of a Judge or of a text-writer, on behalf of his argument.

Reverting to Lord MANSFIELD's *dictum* upon the subject, which I admit not to be a decision, it may be questioned whether he was correct in his regret that the law differed in civil and in criminal cases; because as long as juries give their verdict in the present way, and our proceedings are framed upon the present plan, it is difficult to perceive how any other rule could well be adopted. But at all events the manner in which he refers to criminal proceedings and to the rule then established is free from all doubt and all objection, and nothing can show more clearly than his language does how fixed and undoubted a principle he considered it to be in the criminal law. Indeed he states it as distinctly *in *Peake v. Oldham* (1), as he does in *Grant v. Astle* (2).

But the cases decided, whether in arrest of judgment or on error, naturally deserve more consideration as authorities than these *dicta*, though to these *dicta* great deference is naturally due. It is needless for me to go through all those cases, because I have already dealt with them, so far at least as to show that the distinction will not avail which has been taken between the decisions on arrest of judgment and the decisions on writs of error. But on the latter class of cases, I mean those on writs of error, I must be permitted to dwell a little longer. That of *Rex v. Mason* (3) was on a writ of error in the King's Bench, on an indictment consisting of counts, two of which were clearly bad, and shown to be so; and this case is always held to rule that counts so framed are bad; namely, that in setting forth the obtaining of money or goods on false pretences, it is necessary to specify what those false pretences are, otherwise the counts are bad. Now the judgment here was on the whole indictment, and the punishment was so far discretionary, that either imprisonment or transportation might have been awarded; and therefore the argument used in the present case might have been urged there, that the bad counts might have caused the one judgment to have been given rather than the other. The point

(1) Cowp. 275.

(2) Doug. 730.

(3) 1 R. R. 545 (2 T. R. 581).

was a very few months afterwards brought before the Court, in the case of *Young v. Rex* (1), and which was decided by that Court; Lord KENYON and Mr. Justice BULLER being among the learned Judges who composed it. Upon this case two observations are made at the Bar, and by the two learned Judges *who differ with their brethren. One of those observations is, that the objection was not taken. But to this I answer, first, that the badness of the count was distinctly pressed upon the Court, and was the ground of the application to reverse the judgment; the Court therefore, was well aware that one count was bad. Then I next observe, on the objection taken, that the counsel not taking the objection signifies nothing, if the Court knew that they were dealing with a general judgment on an indictment containing a bad count; for it was, beyond all possibility of question, the duty of the Court to take the objection which they saw the counsel had overlooked, and to say, "This judgment cannot stand; for it is general, and one count of the indictment is bad." The Court did not so declare; and therefore I hold the objection not having been taken at the Bar, to raise a point which the Court could and ought to have raised, is immaterial. The case clearly proves the Court's opinion to have been against the present contention.

The second observation which is made in impeachment of the authority of *Young v. Rex*, and which indeed is also extended to *Rex v. Mason*, is, that there the punishment was fixed; namely, seven years' transportation. Now, as this most clearly is not sufficient to show the punishment fixed, those who use the argument are obliged to say, the punishment of transportation for seven years is fixed. But what signifies that? There were two punishments open to the Court. The transportation—if you transport—is fixed for seven years. No doubt of it; but what signifies that? There were two punishments open to the Court; either imprisonment or transportation. True, if they elected between the two, to transport rather than to imprison, they were limited to one period. But the question before *them was not: Shall we on this indictment, one count of which is bad, transport for more years or for fewer? But the question before them was: Shall we on this indictment, of good and bad counts together, imprison, or shall we transport? And can it be denied, that in solving this question the same argument applied, drawn from the different counts being some good and some bad, which argument is pressed upon us in

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O'CONNELL the present case? Most certainly, therefore, *Young v. Rex* is a
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These arguments apply, perhaps, still more forcibly to *Rex v. Powell* (1), on a writ of error from the Quarter Sessions to the King's Bench. There were two counts in the indictment, and on the offences laid in them different sentences would be given. One was for an assault with an intent to commit a rape; the other was for a common assault. The verdict was, "Guilty of the misdemeanor and offence aforesaid." And if these words were not *nomen collectivum* the judgment must have been bad, because it would have been uncertain on which count that judgment had been given; and one count, that for a common assault, would not have supported a sentence of imprisonment and hard labour. But the Court held the words to be *nomen collectivum*, and thus applied the verdict to both counts. Now, had the doctrine here contended for been at all well founded in the opinion of the Court, it was bound to reverse the judgment, because some part of the imprisonment and labour would have been applied to the count for common assault, which would not have supported the sentence of labour. Yet the party never took this objection, and the Court never took it. Had it been taken, we now know what the result would have been; because the same Judges who overlooked it, or rather who
 [*343] *are said to have overlooked it, have here, on grave argument, decided against it.

It is to be borne in mind, as Mr. Justice MAULE has observed, that, generally speaking, the sentence on convictions only proceeds so far on the evidence at the trial, and on the verdict which was built upon that evidence, as to point out the species of the punishment, and no more. In meting out its *quantum*, the Court may look, and does look, beyond both the verdict and the evidence. The Court, in pronouncing the sentence, takes other matters into its consideration, and its sentence cannot come before a court of error for review. The record must be so framed so that there shall be a good finding on a good count, to justify and support a sentence of that species. The manner in which the sentence is framed in respect of amount is immaterial, the punishment being such as the law warrants for an offence so laid, and on a conviction so had of that offence.

My Lords, I therefore, when called upon to pronounce my judgment, among others of your Lordships, in this case, find myself,

with my noble and learned friend, in this situation : The whole of the learned Judges, as well those who in technical points differ, or rather have their doubts and pause before they concur with their brethren, as those who agree on those points, all with one voice declare that upon the merits they have no doubt at all ; that upon the great merits and substance of the case they are unanimously agreed. That a great offence has been committed, and an offence known to the law ; that a grave crime has been perpetrated, and a crime punishable by admitted and undoubted law, all the learned Judges agree. That counts in the indictment, to bring the criminals, the offenders, to punishment, are to be found, against which no possible exception, *either technical or substantial, can be urged ; that those counts, if they stood alone, would be quite sufficient to support the sentence, and that the sentence is one which the law warrants and justifies, I may even say, commands,—upon these, the great features, the leading points, the essence and substance of the case, all the learned Judges have a clear, unanimous, and unhesitating opinion. But there happen to be in the indictment two counts on which a doubt arises in the minds of some of the Judges, though not in the minds of the great majority, whether those, technically speaking, being ill formed, a general judgment on the whole, good and bad together, can stand. With this question we have now been dealing, and with this only. The learned Judges heard it argued with a degree of elaborate learning, industry, and ingenuity, which I have never known exceeded at the Bar of this or of any other tribunal, in which I have either practised as an advocate, attended as a spectator, or presided as a Judge. Upon the result of that elaborate and learned argument, so ably and so zealously urged, the learned Judges have taken time to consider for weeks ; they have conferred together again and again ; each has heard all that his fellows had to urge ; each has had the benefit of all the doubts which his brethren had to suggest ; and the result of the whole is, that seven out of the nine pronounce an opinion that there is nothing in the objection, and that, notwithstanding the technical informality of those counts, the judgment must stand, and would, if it were before them in their Courts, be refused to be reversed. Two of the learned Judges gave a contrary opinion ; one, at least, a contrary opinion, and another says he cannot concur in the opinion of the majority, on account of the doubts which weigh and press upon and obscure his mind. We are now called *upon to elect between these two courses. The question is,

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whether we shall take our information upon the law, as laid down by those who daily and hourly are administering it, from the seven or from the two. It is the usual course for men, when they consult others in whose judgment they place great and just reliance; those in whom they confide for their integrity, for their impartiality, for their acting without a bias, which often the person consulting finds that his own mind and his own feelings may not be free from: it is the common course, consulting several, and finding a discrepancy among those persons consulted, to weigh a little the grounds which they give. But, above all, it is the common course of rational and sensible men so in difficulties, and so consulting in their difficulties, to see whether the great majority are the one way or the other; and when they find the great majority to be one way, and a small minority the other way, this of itself produces naturally a leaning towards that course, and towards adopting that counsel, which the greater number recommend. But that leaning, how incomparably is it increased, if they find that the seven have a clear opinion, and the other two only doubts; that the seven do not hesitate, do not pause, have no obscurity in their vision, but clearly as well as unanimously are all one way, and have not a doubt in their minds? This being the case, it is a natural thing for me, as a person consulting them, to take rather the clear opinion of the great majority, than the doubting, uncertain, and hesitating opinion of the small minority. It is a case in which I for one, unlearned, so to speak, by comparison with those learned Judges, though I have practised in Courts of criminal law, as well as in Courts of common law, like most of my learned *and noble friends here, have no right to set up my judgment and opinion against an opinion and judgment formed upon such materials, by such men, strengthened by such talents and learning, and, above all, fortified and instructed by such large and long-continued experience as they possess.

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But, my Lords, upon one subject none of them hesitates; even Mr. Baron PARKE's doubts do not continue on his mind here. All the nine learned Judges together, tell me that this is the very first time that such an objection was ever taken; and that all lawyers and all Judges, and all Courts, have hitherto overlooked it, or rather, have hitherto acted upon the supposition that it was untenable; and have never taken it, and have never acted upon it, but have always acted upon the contrary doctrine being the law. That is a great assistance to me in forming my judgment. I then call for authorities

the other way, but I call in vain: for while the learned Judges who are for the practice of the law as it stands; while the learned Judges who will not change the law, but who will continue to countenance and support it, and who say that it is right as well as existing; while they produce cases decided, and *dicta* of Judges, and authorities of writers, and the opinion of the profession,—on the opposite side, against the law, and in favour of the law which we are required for the first time to set up, pulling down the former law, there is not one *dictum* of a Judge, one sentence of a text-writer, or one shadow of a decision to be brought forward.

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This being the case, it appears to me that I have but one course to take in dealing with the question so propounded to me; that is, to take the safer, the surer, the better course; to say, it is good, *stare decisis*, to go with the weight of authority and decision, *and to take the opinion, as my guide, or at least my helpmate, of those learned Judges whom we have called in to our aid, and who are so well informed upon the subject, and so perfectly impartial in dealing with it.

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My Lords, I now come, lastly, to say one word upon the point with which my noble and learned friend concluded his very able address. I mean upon the important question of the challenge to the array, on the ground of the omission of a certain list, somewhere or other, by some person or persons unknown, and not disclosed upon the face of the challenge. And here the learned Judges are quite unanimous, as I understand; at least we have had no objection taken by any of them before us, upon this ground.

Now I no doubt feel very strongly the importance of this subject, and I feel it for this reason: The objection goes to the jurisdiction of the Court in the matter: the Court is composed of a Judge and a jury for the trial of prisoners: that Court consists of one permanent high officer, having jurisdiction, and of others who are not permanent. It consists of the Judge and of 12 lawful men. Those men have jurisdiction given to them by the law of this country, in respect of their being selected after a particular manner; and if they are not selected in that manner, they are not a body having the jurisdiction which the law vests in them if well selected; consequently, the question always is, "Have they been so well selected?" For if they be not well selected, they are not the body invested with that jurisdiction, clothed with those high judicial attributes of being necessary assistants to the Judge upon the trial of the issue. Therefore I very much listen to any argument which would invalidate the

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array, or go to impeach the constitution of the jury as not having been properly selected.

But then, my Lords, I must here again go upon the course of the law and the enactments of the statutes; and the manner must be considered by me in which this objection to the constitution of the jury has been taken and is now before us, after being taken and disposed of below. It was by a challenge to the array, setting forth the malconstruction and formation of the jury. To that challenge there was no issue taken, but there was a demurrer, which admitted the fact of there being a panel of 59 names omitted, out of 700 and odd. Now a challenge to the array, I always understood to be a challenge to the array in respect of the unindifferency of the returning officer, the sheriff or any other returning officer who may have returned the panel, or in respect of the malpractice of him, or of any other returning officer, or of anything done in respect of that panel by those officers, which gives a right to the party to say, "You have erred," or, "You have misconducted yourself." But no authority whatever has been cited to us in the argument, there is no ground of authority or decision or enactment to show us that the mere omission can validly or competently be made a ground of challenge to the array; which is the question and the only question raised by the demurrer.

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Now, my Lords, I must say that I go entirely along with the learned CHIEF JUSTICE in his view, and with the view of my noble and learned friend on the woolsack, of what would be the consequence of allowing this challenge to the array. It would be neither more nor less than this; that for 12 months you must go without either a common jury or a special jury, because you have this book imposed upon you; you cannot get rid of the book. Oh! but, it is said, you may get rid of the book. First, it is said, that the Recorder in this case, with whom the *error is stated to have originated, the returning officer, is ministerial; that it is his error or misfeasance or wrong, and that he is not judicial. But he is judicial. He is to hear and determine, and then he is to make up the book, which is only consequential upon his judicial act of hearing and determining; he does not cease to be judicial at the end of the day, any more than a Judge ceases to be judicial when he signs the sentence or order after having pronounced it, or when he takes the proper steps after having exercised his judicial functions. But then it is said, in answer to the LORD CHIEF JUSTICE, that they are not without remedy in this case, because they may go to the last year's book.

Now what does the statute say as to the last year's book? The statute says, that if there is no book made up, you may go to the last year's book; and when you have gone to the last year's book, you may find just the same sort of nonfeasance or misfeasance tending to make that book invalid. So that you would never get a good jury panel at all, and trial by jury would in reality be suspended, if not abolished. But do the words of the Act, "if there is no book made up," apply to a case where there is a book made up, but where a name is left out? For if this argument be good for 59 names being omitted, it is good for a single one being omitted; it is exactly the same thing. I must say, that I think it would be going a prodigious length indeed to hold that the omitting of one name, in whatever way, from the jury panel, would make a case that no book was made up, and render it competent to the parties to go back to the last year's book. My opinion, therefore, is most decided, that there ought to be no *venire de novo* upon this ground; and here all the learned Judges, without exception, are agreed.

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I should say nothing further but for one observation which I have heard made, upon the great hardship which has been sustained by these traversers, in having endured a partial execution of the judgment pending this writ of error. I have only to say, that the law of the land is so; it cannot be otherwise. And those who most thoughtlessly, and, I think, everything considered, most improperly, have publicly expressed an opinion that the Crown must have lost the power of bestowing mercy and the power of pardoning, if it did not exercise it upon this occasion, totally forget that if the Crown had pardoned pending the writ of error, it had no power of incarcerating if the judgment was affirmed; and consequently it would come to this, that in every case of misdemeanor, without exception, no punishment could possibly be inflicted, because the person has only to prosecute a writ of error, during the pendency of which he must be pardoned; and if the writ of error be decided against him, then the Crown, having pardoned, would have no power of inflicting punishment. And then there is also an end, as appears to me, to all criminal law; for in every case you may bring a writ of error, and so prevent the possibility of the sentence being carried into effect. Whether the law should remain as it is, may be another question. I agree with those who think that it may very well, and very reasonably, be altered.

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My Lords, I have now performed my duty to the best of my ability. I have given to this question as much attention as it was

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possible for me to give. I wish that I could have brought to it more ample stores of learning. My experience, during my practice at the Bar, having been much more limited in criminal Courts than that of many of my noble and *learned friends here, I have been bound to look to authority, and respectfully to consult those learned Judges who are most capable of supplying my deficiencies. With these feelings of respect I have consulted their authority; and upon the grounds which I have stated to your Lordships, concurring in the views of the majority of those learned Judges whose assistance we have had upon this occasion, I have arrived at the conclusion which I have now attempted to state; that conclusion being in favour of my noble and learned friend's proposition, that the judgment should be for the defendant, and against the plaintiffs in error.

LORD DENMAN :

My Lords, in considering the important questions which are involved in the case now before your Lordships, it appears to me convenient to advert, in the first place, to that which has been last argued by my noble and learned friend who has just sat down. I mean the objection to the judgment given by the Court below, allowing the demurrer to the challenge to the array. I am induced to begin with this subject, not only because it is preliminary in the course of the proceedings, but because I think it is important, to a degree which does not admit of exaggeration, to the administration of justice throughout the United Kingdom; and that, if it is possible that such a practice as that which has taken place in the present instance should be allowed to pass without a remedy (and no other remedy has been suggested), trial by jury itself, instead of being a security to persons who are accused, will be a delusion, a mockery, and a snare.

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The traversers challenged the array, on account of the fraudulent omission of 59 names from the *list of jurors of the county of the city of Dublin. The *Attorney-General* demurs to that challenge, admitting thereby that that fact has taken place. It appears to me that that challenge ought to have been allowed: that was the opinion of one of the learned Judges of the Court of Queen's Bench in Dublin; an opinion stated by him with the diffidence which becomes one who differs from his brethren, but at the same time stated with firmness and perspicuity, and for reasons which, I venture to think with great confidence, received no kind of answer from the learned Judges who formed the majority of that Court

Speaking with the same diffidence, I disagree with the opinion which then prevailed, and which has been repeated by the learned CHIEF JUSTICE upon the present occasion, speaking herein for himself and all the other Judges who attended the consultation at his house. I think that the principle laid down in that opinion is not correct. With deference to him and to my noble and learned friend on the woolsack, I think that the principle of challenge to the array is not confined to the narrow issue, whether the sheriff has done wrong, but involves that larger question, whether the party has had the security of trial by a lawful jury of his country.

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I feel it to be a great misfortune to differ from all my learned and respected brethren who have been consulted on this subject; but I confess that that regret is in some degree diminished, so far as my own position stands with reference to this matter, by a circumstance which I must be allowed to state; and as I have put it in writing (because at one time I thought that it ought to have appeared upon your Lordships' minutes), I shall take the liberty, with your Lordships' leave, of reading that statement. When the Judges *are consulted by this House upon any case submitted to them, it is not usual for such Judges as have the honour of a seat in your Lordships' House to attend their consultation; but I was so much struck with the immense importance of this present question, and so entirely unconvinced by the reasoning of the learned Judges in Dublin, that I felt a strong desire to ensure the benefit of a full discussion of that point; and I accordingly wrote to my brother COLERIDGE, several weeks ago, thinking that he would attend that consultation, and would submit that point to the learned Judges. Most unfortunately, however, he was prevented by illness from leaving his room, but he wrote his opinion upon the whole subject; sending one copy of it to the LORD CHIEF JUSTICE, and another to myself.

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"I answer this sixth question," he says, "with much doubt, being wholly unable to look into the authorities, and knowing that I differ in opinion, so far as my opinion is formed, from my brother PATTERSON. It seems to me that all questions touching the formation of juries must be examined by the Judges with very critical eyes. Taking the facts from the challenge of one of the traversers, and dismissing all other knowledge, it must be admitted that the Recorder has sent no general list, as required by the statute, to the sheriff; that by some persons unknown a spurious list has been transmitted, omitting the names of many qualified special jurors; that this has been done fraudulently, with intent to prejudice him upon

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his trial; that from that spurious list the jurors' book and special jurors' list have been made, and the present array selected; and that the traverser himself is wholly unparticipant in this fraud, and protested against the array being constituted from the list so framed. Here," he proceeds, "is a confessed and serious wrong; and the *only question is, whether a challenge to the array be the proper remedy. It is said, first, that the sheriff is not in default; and, secondly, that if the challenge be allowed, no better materials can be found for the array, for the book now formed is by law the book from which any other jury must be selected. With great deference, I submit that neither of these is an answer. Suppose at common law a challenge to the array," and then he puts a particular case in which the sheriff may have made an imperfect array, and yet not have been guilty of any default at all; and he says: "yet I apprehend the array would have been quashed. So here, the sheriff may not be in default, but still, if the materials for a jury have an inherent defect in them, the defendants are not to suffer, but the challenge ought to be allowed." Then he answers the second argument by observing, "the only consequence is, that the trial may remain untaken;" and he expresses in strong language his own opinion, that far better it were that no trial should be taken under those circumstances, than that it should be taken subject to the heavy suspicion which these facts must involve. He further observes, "It is to be considered whether, as the Recorder has sent no list to the sheriff, there is any book made up for the year; and whether therefore the book of last year is not that from which juries ought to be taken. That the fraud is not charged upon the prosecutor is, in a criminal question, quite immaterial. Upon the whole, I confess I think that, dealing with modern legislation upon the subject of the returns of juries, we ought to consider all those officers who now take any part in what would have been the sheriff's duty at common law, as included, for the purpose of challenge, under the term 'sheriff.' I repeat, that I submit this with the greatest diffidence."

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On Monday, when the learned CHIEF JUSTICE stated to this House the entire agreement of all the Judges on this point, and afterwards the agreement of my brother COLERIDGE with himself and them upon the other points, I did not think myself justified in alluding to that letter, because I rather concluded that my LORD CHIEF JUSTICE had had a subsequent communication with my brother COLERIDGE, in which he might possibly have seen some

round to alter his former opinion; but when I left your Lordships' House I found upon my table, on my return home, another letter from my brother COLERIDGE, written the day before. I had stated to him my general views upon this subject; and in this second letter, after repeating what he had before said, that he thought the argument in favour of overruling the demurrer was too technical for the decision of a great constitutional question, and stating again the view he took of the balance of conveniences, he says this,—the note is written by his son, as he himself unfortunately is not at present able to write, "He is much struck by what you have written on the question of challenge; and at present, like your Lordship, awaits the better arguments that are to be adduced on the other side."

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Now I have a right to state, that I do not stand in the unfortunate position of being alone among the Judges, in not thinking that anything may be done with any panel out of which a jury may be drawn, and that there is no redress for the injury which may be so inflicted. I venture also to think, as I believe my learned brother COLERIDGE will think, that those better arguments have not yet been adduced.

My Lords, I shall shortly notice the reasoning employed in the Court below upon this subject. There was originally, perhaps, some notion that the challenge *to the array was taken away altogether by the present Jury Acts, 6 Geo. IV. c. 50, for England, and 3 & 4 Will. IV. c. 91, for Ireland; but that clearly is not the case, because there is in each a particular provision which preserves the right of challenge to the array,—sect. 28 of the former, sect. 21 of the latter. I do not trouble your Lordships with the particulars of that argument, because it is not now doubted. It was also a question whether a challenge lies to the array, where a special jury has been struck, because the consent of the party might have got over any previous difficulty: but it having been already held by Lord TENTERDEN and the Court of Queen's Bench in England that such a challenge does lie, I do not think there is any great impropriety in supposing that that is equally free from doubt; and I cannot question that, in the case of a special jury also, a challenge to the array may be entertained by the Court.

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My Lords, the next point is—that upon which both my noble and learned friends have proceeded; namely, that the principle of a challenge to the array is solely for unindifferency or misconduct on the part of the sheriff. The judgment that I have formed, and

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in which my brother COLERIDGE states very clearly his agreement upon the present state of the law, is this: that that which was the single duty of the sheriff in former times,—to collect the names, to determine who were fit to be the jury, and afterwards to enter them on the panel,—that all those duties, which belonged to the sheriff alone, by the late Act of Parliament are divided in Ireland between the tax collectors, in the first place; the Quarter Sessions, that is, on the present occasion, the Recorder of Dublin, in the second place; and the sheriff, in the third place. The tax collectors *perform a duty which is merely ministerial; the Recorder, in the first instance, performs the judicial duty of deciding upon the admission of claims, and upon objections; and then his duty is to sign and settle, and transmit to the sheriff, the list which is to be the jurors' book for the following year. The ground of challenge to this array was, that after the Recorder had exercised his judicial functions, after he had determined, "This shall be the list for the county of the city of Dublin for the ensuing year," somebody else had said, "This shall not be the list; that is the list, and that shall be taken, and that shall become the jurors' book." The handing over the perfect list by the Recorder to the sheriff is a ministerial act, but that ministerial act has been imperfectly, or rather not at all, performed. The challengers say, "You have deprived your own judicial act, which has been properly performed, of the weight of authority to which it was entitled; you yourself have handed over a list which has made the book imperfect, and therefore we contend that that is no book."

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My Lords, I cannot help believing that if that view of the case, which my brother COLERIDGE states far more forcibly than I can do, had been presented to the learned Judges at their consultation, they would have thought it an argument at least worthy of consideration. I think they would not have held it sufficient to say in answer, "We find in Lord Coke that it is only in respect of a default by the sheriff that a challenge can be made." The sheriff was then the only officer entrusted with the return of juries, except the bailiff of a franchise, who is an officer strictly analogous. My noble and learned friend I think stated it truly when he said, "The objection is to the conduct of the returning officer." The same *language occurs in Viner's Abridgment, title Trial. Then who is the returning officer? Why the Recorder is the returning officer for this purpose; and, in my opinion, the Recorder, though

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without the slightest imputation upon his motives, which is disclaimed by all, was guilty of a default, when he handed over to the sheriff, as the list to make the jurors' book, that which is not the list required by law; and with respect to which, the Recorder himself had declared that that shall not be the list, but that another shall. He indeed is free from all suspicion, but he has power to indulge the grossest partiality; and if he were justly suspected of it, the general argument would leave the defendant without any protection against its effect.

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My Lords, I have written a great deal more than I should be desirous of troubling your Lordships with; but I have stated my dissent from my learned brother the CHIEF JUSTICE of the Common Pleas, upon the principle upon which the challenge to the array is allowed; thinking the true principle of the challenge to be, the security of the parties that a jury shall be fairly taken. The punishment of the sheriff for any default is wholly immaterial to the parties, who have no other interest than that security, though the law enabled the Court to visit the misconduct of its officers with just displeasure. I also differ from him and from my noble and learned friends who have addressed you this morning, in what they have stated as to the consequences which are likely to ensue. The learned LORD CHIEF JUSTICE says, "No object or advantage could have been gained if the challenge had been allowed; for if the challenge had been allowed, the jury process would have been directed to some other officer." Now there I venture to think that there is *a mistake. The default is not that of the sheriff, and therefore the duty of making the return would not have been taken from the sheriff. The default is either in the Recorder, or in the clerk of the peace who acts for the Recorder, and who sends to the sheriff an incorrect list. There would, therefore, be no reason whatever for depriving the sheriff of his right to return a second jury, if the first were set aside on this objection. A *venire facias de novo* might now issue, if this were the only objection; and at this very moment the book may be found perfect, notwithstanding the mutilation that it underwent in the meantime; or circumstances may arise to deprive these defendants of the right of challenge. What may occur in the course of pleading, upon any future challenge to the array, I know not, and have no right to conjecture.

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The Act of Parliament expressly provides for the want of the jurors' book being returned. My noble and learned friend on the

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woolsack meets that by saying, "Here is a book returned;" but what is the book returned? The Act of Parliament requires that a book shall be returned which is correctly made up from the list; but the book which has been returned is a book incorrectly made up from the list. It is said on the one hand, "What! if there is a single defect, is that to vitiate the whole?" And there I think the learned LORD CHIEF JUSTICE has fallen into a mistake, which probably would have been corrected if this opinion, proceeding from so humble an individual as myself, had been thought worthy of discussion at their meeting and of a more specific answer here. He says, "If in England, through accident, carelessness, or design, a single name had been omitted in the list delivered to the clerk of the *peace, according to the argument the whole book would have been vitiated." I beg leave to question that altogether, because all that is done previously to the decision of the Quarter Sessions is referred to that decision; that decision is in itself judicial, and makes the book from which I say that the parties had a right to have their jury selected.

When this argument, to which great force was given in Ireland, was stated at the Bar in this House, the *reductio ad absurdum* was encountered by an opposite one of much greater extent; for the argument was, "If I am unreasonable, and if the consequence is very inconvenient of saying that the omission of a single name shall vitiate the whole book, and make it a different book, what is the effect of omitting 60 names?—what is the effect of omitting 600 names?—because either of these modes of proceeding is equally beyond the reach of question, unless this mode of questioning it is to prevail." My Lords, I admit the inconvenience may be very great upon a single occasion, that parties shall not be tried out of any book that the sheriff has received. But let me here observe also by the way, that the decision in the case of *Reg. v. O'Connell* is no decision upon any other case. If the other parties who have issues to be tried are satisfied with the jury book as they find it, we may be sure that they will not challenge; but if they do, and if a true jury book has not been returned for that year, the law itself provides that the former jury book shall be resorted to. And this is the law of England, as well as the law of Ireland, which follows it as closely as the different circumstances of the two countries will permit. My Lords, my learned brother the LORD CHIEF JUSTICE supposes that the omission of one name from the unrevised lists would, on my argument, *destroy the array. With great submission I think I

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we have shown the contrary, and that probably no inconvenience could arise from holding it to be vitiated by the fraudulent abstraction of many names after the lists have been adjudged upon and signed. I humbly ask, what balance is there between the two sets of inconvenient consequences? Is it not right to hold the public officer to the strict and faithful discharge of his easy duty? Can anything be more wrong than that he should enjoy full licence to tamper with these sacred documents according to his pleasure?

Now, my Lords, what follows appears to me to be of the very highest importance. That there may be the greatest wrong and injury committed by this very omission of names from the list, is universally acknowledged. And the CHIEF JUSTICE says, "that there must be some mode of relief for an injury occasioned by such non-observance of the directions of an Act of Parliament is undeniable." So all the Judges in Ireland still more emphatically assert. So says my noble and learned friend on the woolsack. So says my noble and learned friend who has just addressed your Lordships. What then is the mode of relief?

My noble and learned friend on the woolsack did certainly raise my expectations to a very high pitch upon this subject. In one part of his argument he said, "The party is not without a remedy; the party can set himself right. There may have been a great error, a great injury; but there is a correction for that error, a redress for that injury; there is a way to prevent the injustice of such a trial as the law never contemplated, and would not have endured." Then I wanted to hear from that high authority, what is that remedy? what is that redress? and what is *that mode of preventing one of her Majesty's subjects from being tried by such a jury as the law never provided for him? "Oh," says my noble and learned friend, "you must excuse me there. I shall put off telling you what the remedy is till some future occasion;" as if any occasion could more pressingly require the statement.

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When my LORD CHIEF JUSTICE and the other learned Judges in England, and the learned Judges in Ireland, and my LORD CHANCELLOR, can inform us of no remedy whatever against this, which is admitted to be possibly the greatest wrong, and productive of the greatest confusion and interference which it is possible to contemplate, with the sanctity of the law and the security of the subject, I shall venture to go farther and declare, that, if this right of challenge is gone, the law provides no remedy: but I will not believe that the law can have placed its subjects in such a situation. Unless I see

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the old and well-known constitutional practice of challenge to the array, founded on the principle of the array being itself incorrect and injurious to the party, unless I see that ancient process directly repealed by Act of Parliament, I will not believe that that process does not still exist, and that that remedy is not still preserved to the subject. The absence of all other remedy in a case of such immense importance, is to me demonstrative proof that that old remedy exists; that the objection has been well taken; that the challenge ought to have been allowed, and that the trial has erroneously proceeded.

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My Lords, I shall keep my promise, and spare your Lordships the hearing of much which I have collected. But there is one thing too remarkable to be overlooked. In that short passage in Lord Coke, *which contains the whole of the learning upon this subject (Co. Litt. 156), he cites a case from the Year Books, which is twice reported, once in the 17th of Edw. III., and once, I believe, in the 20th of Edw. III., though I think *Mr. Hill* quoted it as the 50th. I could not find it there, but I found it in the 20th, and I have it copied before me. The sheriff returned a list, which the bailiff of the franchise ought to have returned; that was held to be wrong *primâ facie*, because it deprived the party of his challenge against the bailiff individually. But then it was argued, "Oh, but there are good names enough returned by the sheriff to ensure the party a fair trial;" exactly the argument which appears to have succeeded in Dublin. But the Court held, in the time of Edw. III., that as the array was one entire indivisible thing, one error would vitiate the whole, and the whole was accordingly set aside. In that very case the sheriff was charged with unindifferency; the question of his unindifferency was tried, he was acquitted upon that charge; and yet the fact of his having done, though not with any corrupt or partial intention, that which gave a different jury, was deemed a default sufficient to set aside the whole proceeding.

My Lords, I must not leave this subject without observing yet further upon the want of other remedy. It was suggested in the course of the argument here, by some learned person, I think, that an application might be made to the Court. What! are the Queen's subjects to apply to the discretion of the Court to have a lawful jury to try them for their lives, for their liberties, for their most important interests? Is it to be a thing upon motion, and upon affidavit, and upon written deposition, the party accused

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always *swearing last; and after all, the matter referred to the

secretion of the Court, the decision subject to no appeal? But in this case I find the Judges stating that there was such a motion. The motion was refused. Upon what ground I do not know, for I have read nothing of these proceedings but what I have seen in the papers printed for our use. But as I understand the facts, I must take the liberty of saying, that it would startle any Court in England to hear that such a motion as that should be refused; because I understand the whole list of jurors for the county of the city of Dublin consists of 717; it is so mentioned by Mr. Justice BURTON, in his judgment. Now the special jury list out of that will be a very small and inconsiderable proportion of it; and the omission of 59 names out of such a proportion of the sheriff's jury list as remained for special juries, is enough to affect any panel. I am not sure whether I am stating correctly the number of the whole book, or not. If not, I shall be glad if any learned gentleman can correct me; but I gather also, from the case of *Rex v. Fitzpatrick*, that 725 was the number of the whole list of jurors.

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The Attorney-General for Ireland :

As your Lordship has appealed to me, I would say that the special jury list contained the names of 700 and odd.

LORD DENMAN :

I am much obliged for the correction, and indeed thought it very likely that the number must have been greater than it would appear in both those passages; but still I cannot help thinking that the omission of 59 names is considerable enough *to affect any party's chance of obtaining a right jury. The number seems to me to be a great proportion. It is obviously by no means impossible that, if those 59 names had appeared in the panel, the whole jury might have been drawn from those names; and who can tell me that the effect of the evidence upon the minds of the jury might not have been entirely different, if they had consisted of those gentlemen? That, however, is a subject upon which I think I am not at liberty to enter. I consider that it cannot be incumbent upon any person to prove any other particular injury, than simply and solely that one of her Majesty's subjects, put upon his trial, has not had the security which is provided for him by law, that that trial shall be a fair one.

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If this be otherwise, if the old redress is abrogated and no new provided, that improved law, which was intended to place the

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construction of juries beyond all abuse and all suspicion, would have the effect of securing success to the worst manœuvres, and of unsettling the public confidence in the most important functions of justice.

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My Lords, I now proceed to the other question, which I certainly approach with all that diffidence so properly expressed by those learned persons who differ from the very weighty opinions which have been given by the majority of the learned Judges to your Lordships. In the first place, it is my bounden duty to state that I do not entirely agree with the learned Judges in thinking that there are only two objectionable counts; it appears to me that there are other counts open to very serious objection, and I should be sorry to preclude myself by anything which I may now say from giving a judicial opinion against counts *so generally stated, and charging as an unlawful act a conspiracy to excite dissatisfaction with the existing tribunals, for the purpose of procuring a better system. I am by no means clear that it may not be an innocent and a most meritorious act; I am by no means clear that there is anything illegal involved in exciting disapprobation of the courts of law, for the purpose of having other Courts substituted more cheap, efficient, and satisfactory. But it is quite enough for me, for the purpose of the present argument, as the learned Judges have given their unanimous opinion that there are two bad counts, to declare my agreement in that opinion, and for the reasons assigned. Now the question is whether the judgment which has been pronounced, and the sentence which has been passed, can be good, under such circumstances.

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The question, as put by your Lordships to the Judges, is this: (His Lordship read the 11th question. See *ante*, p. 86.) The Court has pronounced its sentence upon the defendant in respect of counts A., B., and C.; in respect, that is, to "his said offences." But it is said that the sense of these words, according to the approved rules of construction, is, that they mean only such offences as shall appear after legal argument to be well laid. I cannot think so. It appears to me to be an extremely ingenious turn of language to say that you can so confine it. Here are three counts, each laying what is presumed to be an offence; on each the grand jury has made presentment of a true bill. To each of those three counts the plea "Not guilty" applies; upon each issue a trial takes place; upon each there must be evidence given; upon each of those three counts the verdict is taken. The *Court proceeds to

say, "For his said offences—the offences of which he stands convicted,—I sentence him to a certain discretionary punishment; to a punishment which I inflict according to my discretion, and according to my view of his demerits, as found guilty of those his said offences."

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We are told that it is necessary to "presume" (my noble and learned friend on the woolsack repeatedly used the word "assume") "that the Court pronounced their judgment on the good counts only." In the first place, I feel an unconquerable repugnance to that; because I cannot be ignorant that I should be setting up a presumption in direct contradiction to the notorious fact. If your Lordships are to teach the present and future students of the law what the law is upon this subject from your proceedings in this case, and you say, "We must by law presume that the Court in Ireland passed this sentence upon the good counts only,"—at least those members of the legal profession who go to practise on the other side of the Channel will take in the reports of the Court of Queen's Bench in Dublin, and there they will find a solemn decision directly contrary to what your Lordships will have thought proper to assume; because there, on motion in arrest of judgment upon the ground that these two very counts were bad, the Court said, "These counts are perfectly good; they are unexceptionable." Strange now to call upon your Lordships to assume that those counts were not acted upon by that very Court which tells you that they are so good that they are determined to act upon them.

But, my Lords, not only is it against the notorious fact, and, in my opinion, against the plain meaning of the words, but it is against the common probability *of every case. And here I must take the liberty of adverting a little to my own experience, which is not very short, in criminal Courts, upon this subject. I know what course I should have taken if I had been pressed to give judgment at the moment, and had then given it. If nothing had taken place respecting the validity of the indictment or any part of it, and much more if such validity had been disputed, but established, according to my view, I should have deemed it my indispensable duty to apportion the sentence to the degree of criminality that was stated in all the counts that were proved by the evidence.

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My Lords, I quite agree with Mr. Baron PARKE, as to the general opinion which has prevailed in the profession upon this point. He and Mr. Justice COLTMAN have both stated the existence of that opinion as a fact upon which no doubt can be entertained. I felt,

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as my learned brothers did, great surprise when I heard that most able and ingenious argument which was addressed to the House, and I confess that I had never felt a doubt upon the subject until that argument was submitted to my mind. But I must add that I never had occasion to give a judicial or a professional consideration to the matter. And I must ask, when such an argument is raised, what is the duty of a court of error? To consider whether the doubt is well founded or not. Not to be run away with by mere authority, unless indeed it is so decisive as to get rid of the doubt; but to see whether in point of law there is legal ground for the doubt which is entertained. My Lords, this no unusual practice. This is not the first time that a court of error has taken that view. I perfectly well remember, not indeed in a *court of error, but at the time when my noble and learned friend on the woolsack was presiding with so much dignity, and so beneficially to the public, in the Court of Exchequer, a case was brought before that Court, upon which it was proposed to overrule, not the *dicta*, the impressions, the fancies of the learned frequenters of Westminster Hall, but decided cases, running through a period of near 50 years, appearing in numerous reports, and laid down by all the text-writers. I believe Mr. Justice BAYLEY, on a particular examination of those cases, thought them clearly founded in error; they were traced to a *dictum* uttered by Lord MANSFIELD in his first judicial year, which *dictum* was held by Mr. Justice BAYLEY to be untenable; and my noble and learned friend pronounced the unanimous judgment of his Court, denying the authority of these cases, and overruling them all. I speak of the case of *Hutton v. Balme* (1). The same question, in another case, came afterwards upon a writ of error before your Lordships' House (2); and your Lordships thought that you were bound by the authorities, although the principle might not be perfectly clear. But that did not prevent my noble and learned friend and the Court of Exchequer from entering into a full consideration of the question, whether in point of principle those cases were good law, or whether they ought not to be rejected if proved to be founded on mistake; nor did any one impugn their right and their duty to examine in that way any legal proposition.

I heard my noble and learned friend (Lord BROUGHAM) with the admiration I always do, when he laid down the rule on this subject.

(1) 2 Y. & J. 101; 2 Cr. & J. 19; 2 Bing. 471.

Tyr. 17; and on error, 1 Cr. & M. 262; 2 Tyr. 620; 3 Moo. & Sc. 1; 9

(2) See *Garland v. Carlisle*, 4 Cl. & Fin. 693.

He reminded *your Lordships that you are not bound to do more than respect in the highest degree, and consider with the utmost care, the opinions which may be given to you by the Judges. But you have a duty of your own to perform. Your consciences are to be satisfied; your minds are to be made up; your privilege affords you the assistance of the most learned men living; but your duty forbids you to delegate your office to them.

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And, my Lords, what happened in this very House not twelve months ago? (1). There was an universal opinion at the English Bar, founded upon the *dicta* of Judges as illustrious as any who have ever filled the seats of justice in any country, upon a question of no less importance than the nature of marriage; Lord MANSFIELD, Lord ELLENBOROUGH, Lord KENYON, Lord TENTERDEN, Lord Chief Justice GIBBS, and many others, all clearly taking the same view of the subject, in *dicta* which perhaps did not in any one of them go precisely to the extent of a decision upon the subject, but which showed their opinion upon the nature of the contract, and that those enlightened minds had come upon general principles to a certain conclusion. Nay more, Lord STOWELL, half a century of whose invaluable life had been devoted almost exclusively to the consideration of this subject, had pronounced a decision conformable to that opinion. Your Lordships had the case before you. The Judges of the present day were consulted, and formed an opinion directly contrary to that of their predecessors in former times; they did not feel themselves deterred by this great concurrence of authorities from asserting their opinion as to the law. But did my noble and learned friend (Lord BROUGHAM) feel himself fettered by this unanimous opinion of the present luminaries of Westminster *Hall? By a most powerful argument he sought to overthrow their conclusion, and strenuously exhorted your Lordships to dissent from it. Nor did he stand alone: others among us concurred with him in holding the former principles to be just, and the reasoning of all my learned brethren to be insufficient to confute them. Your Lordships have not forgotten the termination of that case. Those of your Lordships who took a part in the discussion were equally divided; the consequence of which was, that the judgment of the Court below stood affirmed, deciding against the *dicta* of those most venerable and distinguished individuals.

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Now, my Lords, after that proceeding, which indeed followed many precedents, are we not bound to make a full examination of

(1) See *Reg. v. Millis*, 59 B. R. 134 (10 Cl. & Fin. 534).

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the grounds and reasons upon which the Judges may have founded the opinion which we asked at their hands? Having done so in this case, I must venture to say that my surprise has changed its object. I no longer wonder that the objection should have been taken to the supposed law, but that such should have been supposed to be the law. I am convinced that it never has been the law; and I think a slight attention to the cases will show that that is the true conclusion at which to arrive.

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My Lords, this whole doctrine has arisen upon a single remark of Lord MANSFIELD, twice repeated. It was made on occasions where it was perfectly immaterial to know what his Lordship might think about criminal law, and where it is clear that his Lordship unnecessarily went out of his way to heighten a grievance which he thought he found in the practice in civil actions, as contrasted with that in criminal proceedings. He says, "In cases of civil actions, where there is one good count and one bad, and the verdict is general and for damages, in that case the *Court above will be bound to set aside that verdict, because the damages proceed upon all the counts, and you cannot tell how much may have been given for the good count;" and this undoubtedly is both true, and, in the supposed circumstances, inevitable. But I most deeply regret that it did not occur to Lord MANSFIELD that, presiding at Nisi Prius, he had a plain remedy for that evil in his own hands; because he had nothing to do but to tell the jury to assess the damages separately upon the several counts, and then the damages would have stood for what they were worth; well awarded upon those counts which were good, and liable to be set aside upon those counts which were bad. Why, upon that occasion, that noble and learned Judge should have thought it necessary to say one word respecting the rule in criminal cases, I am quite at a loss to conceive.

He does, however, say that; and there cannot be a doubt that, in one sense, the assertion is correct. For if an ingenious counsel should, after a verdict finding the party guilty on all the counts of the indictment, object to one of them that it was bad in law, he would be told that one such objection was immaterial, since there were other counts, on which, if good, the Court might proceed to pass sentence. It is clear that this opinion, taken up in general terms, has engendered the notion which has been universally prevalent in Westminster Hall. Several Judges, and many barristers and persons in high situations, have expressed the same opinion in the same general terms, and they have taken for granted

that it might be truly so stated. And I am tempted to take this opportunity of observing, that a large portion of that legal opinion which has passed current for law, falls within the description of "law taken for granted." If a statistical table of legal propositions should be drawn out, *and the first column headed "Law by Statute," and the second "Law by Decision;" a third column, under the heading of "Law taken for granted," would comprise as much matter as both the others combined. But when, in pursuit of truth, we are obliged to investigate the grounds of the law, it is plain, and has often been proved by recent experience, that the mere statement and re-statement of a doctrine,—the mere repetition of the *cantilena* of lawyers, cannot make it law, unless it can be traced to some competent authority, and if it be irreconcilable to some clear legal principle. Now in this case, from Lord MANSFIELD's uncalled-for remark, that a good judgment can be pronounced on an indictment which contains some counts so bad that on them the judgment might be arrested, it has, I think, been rashly and groundlessly taken, for granted, that a general judgment pronounced upon an indictment consisting of bad as well as good counts, where a verdict has been taken for the Crown upon all, cannot be reversed upon writ of error.

I have before ventured, my Lords, to speak of my own experience, and I must here do so again. I think that some of my learned brethren, who stated their views on a former day, have really forgotten some matters of ordinary practice, or their practice must differ wholly from mine. One of their statements is, "that when there is an indictment containing several counts for felony, you take the verdict of guilty as a matter of course upon all the counts, and if there is any one count good, that will support the judgment." I am compelled to deny that this is the universal practice; because I know that whenever I have had to try a criminal upon various counts in one indictment, I have always thought it my duty distinctly to put it to the jury, "Do you agree that there is any proof upon this point? because, if not, we shall discard *it." For instance, upon a count charging an intent to murder, I should say, perhaps, "You cannot believe that he intended to murder; and therefore, if you agree with me, you will relieve the prisoner from that part of the charge." So of the counts charging an intent to disable and an intent to maim. "No such intent," I might say, "appears to have existed; but as to the intent to do grievous bodily harm, you will consider whether you

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think that it is or is not proved." If the facts required it, I should take care to desire the jury to say "Not guilty" upon the first three counts, and "Guilty" upon the last count alone. And again, if any of the counts appeared to be bad, I should take the verdict on the good counts only. The prosecutor might enter a *nolle prosequi* on the bad ones, or offer no evidence, and consent to a verdict of acquittal upon them; or possibly they might be quashed by the Court for insufficiency.

I say that any one of these is a proper course, and that it removes all difficulty. What harm is then done? Why is the verdict to be taken upon all the counts, good and bad? Your Lordships heard it stated the other day, that unless that practice is allowed you will impose upon the Judge the inconvenience of being compelled to form an opinion on the validity of the counts, before he proceeds to pass judgment. I see no inconvenience in that. I think he ought to take care that the count is good before he allows a verdict to be taken, or at least before he allows judgment to be entered up on it. So far from thinking that any evil will arise from that practice, I think very great good will arise from it. And I must take the liberty of throwing in the observation, that in my opinion there cannot be a much greater grievance or oppression than these endless, voluminous, unintelligible, and unwieldy indictments. An indictment which fills 57

[*375] closely printed *folio pages is an abuse to be put down, not a practice deserving encouragement. Most of the persons who are accused of offences are in a line of life which does not enable them even to get a copy of such a charge from the clerk of Assize, who will not part with it without his fees; and when the party accused has obtained a copy, the greatest stretch of mind of the most learned persons can hardly, even for days, as we know from the arguments at your Lordships' Bar, find out what it is that is really the matter of criminal charge. It is often ambiguous to that degree, that possibly the pleader who drew the indictment may mean one thing, the Judge another, the jury a third; and the jury, if asked whether the party was guilty in the only sense in which the law would condemn him, might in that sense have acquitted. A fourth sense may, perhaps, be discovered by the court of error, for these ambiguous phrases; unless, indeed, there should be a single good count among numerous bad ones, and then the court of error would be invited to say, "Do not trouble yourselves to inquire whether those charges are good; throw them over

altogether ; presume that the sentence was awarded in respect of the single good count, and that alone.”

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I am deliberately of opinion, that the practice of selecting at the time of trial the counts on which judgment may be lawfully awarded, is the right and wholesome practice, producing no inconvenience, and affording a great security for justice. In old times, when the indictment consisted of a single count, it was of necessity the universal practice to form an opinion whether that count was valid ; the constant aim of modern legislation has been to simplify criminal charges, nor is any object worthier of attention in framing the code of every civilized country.

I think, also, there has been another mistake made as to the practice of the Court of Queen's Bench in this country. It is said, that when an objection is taken, and a motion made to arrest judgment upon a particular count, the Judges are in the habit of saying, “No ; we shall not hear any argument upon that particular count, because there is another count upon which the judgment may be supported.” Nothing is more reasonable, if some counts are admitted to be good. But was that the case last year, in the indictment against Feargus O'Connor ? (1). There were two counts only upon which he and others were found guilty ; upon one of them, namely, the fifth, we first of all proceeded to hear an argument whether or not the judgment should be arrested. If the judgment had not been arrested, we should have proceeded to pass judgment upon that count. We thought, however, that the judgment ought to be arrested upon that count ; and thereupon it became necessary, in the second place, to examine another count of doubtful validity, upon which the jury had also found the prisoners guilty. That count was framed in a style of excessive verbosity and ambiguity of expression, upon which no clear ideas could well be formed. The then *Attorney-General*, my right honourable friend the present LORD CHIEF BARON, discovered that there existed very great doubt in the minds of the Judges whether that other count was a good one, and accordingly he has never pressed for judgment upon it. But the course then taken was to attempt to arrest the judgment, and the argument for arresting the judgment was permitted upon those particular *counts which were successively attacked as bad counts. It is not correct, therefore, to say that the Court would never enter into that consideration.

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(1) In Trinity Term, 1843 ; not on the insufficiency of the allegation reported. The judgment was arrested of venue. See 13 L. J. M. C. p. 33.

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The subject may be illustrated by a case particularly in my mind, which occurred lately before me at Guildhall (1). There was a doubt made whether a charge of conspiracy in one of the counts was not altogether good for nothing, as stating facts which had taken place in a foreign country. My observation upon that was, "I shall not pass judgment here, though a verdict of guilty should be returned, and therefore it is immaterial what I may think about the goodness of that count;" but if I had been obliged to pass judgment there, then the judgment would have been upon both counts, and the party must have taken his chance of what the court of error might afterwards have thought upon the goodness of the count. But it seems to me that, as in the case of damages, I have suggested a short and simple mode of keeping clear of all difficulty, which I am sure no lawyer will contest with me. So with regard to several counts in criminal cases, the objection may be entirely avoided by the Court passing a separate judgment upon each count, and saying, "We adjudge that upon this count on which the prisoner is found guilty, he ought to suffer so much; that upon the second count he ought, on being found guilty, to receive such a punishment; whether the count turn out to be good or not, we shall now pronounce no opinion." And that question would be reserved for the superior Court. A court of error would then reverse the judgment only on such counts as could not be supported in law, leaving that to stand which had proceeded upon the charges which were valid.

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Now, both my noble and learned friends have stated that this is a mere technical objection, and that no injustice can arise from the existing practice. I must say that I think the greatest injustice may arise from it. It is very different from irrelevant stuff being foisted into a good count. That is highly improper, if it is done by way of prejudice, because a criminal charge ought to be distinct, clear, and intelligible in itself, and free from all matter of imputation that does not belong to the offence. But still the Court would easily throw aside that irrelevant abuse, and pass judgment only for that which goes to make up the offence. Suppose there had been three indictments, and the prisoner had been found guilty upon all three, and the Court had been permitted by the practice to pronounce one judgment upon all in one sentence, I do not see how it would be at all different from what has taken place here.

(1) *Qu.* the case of *Reg.* v. *Lord Ashburton*, tried before Lord Denman at Guildhall, on the 1st and 2nd of July, 1844.

The subject is so far from being merely technical, that it may involve the greatest injustice; because you may inflict the heaviest punishment for the lightest offence, or indeed for that which may turn out to be no subject for punishment at all.

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My noble and learned friends have referred to some authorities, which it would not be right for me to pass over altogether. They of course selected those which they thought the strongest, and to those I shall direct my attention. The first, I think, which was mentioned, was the case of *Rex v. Powell* (1), in which there was a general verdict of guilty, for two offences stated in two different counts, one of them charging an assault with a particular intent, and the other a common assault. The sentence was general, and was such as only the verdict *upon the first count warranted, and a writ of error was brought. Now there is one very remarkable circumstance in that case, which appears in the judgment of Mr. Justice TAUNTON. He says: "When I look at this indictment, I do not find that it states two offences; it does not say that he committed another assault, which is the usual course of doing it; but in fact it is only another description of the same assault, and therefore there is nothing at all wrong in saying that the heavier punishment which the first count enabled the Court to award is properly assigned." But the only objection taken there was simply this, that the words "misdemeanor and offence" applied to one of the counts alone: the Court held that it applied to both; that "misdemeanor" ought not to be confined to the offence described in one count, but is *nomen collectivum*, including the offence with its aggravations, as stated in the first count, as well as the mere assault, as stated in the second. That is the decision which the Court came to upon that occasion: and to apply that here, as laying down the principle that we must secure the right of the prosecutor to convict generally, and have a general sentence passed, unquestionable in error, though it should turn out afterwards that there was some bad count in the indictment, stating a different misdemeanor, is what I cannot at all understand.

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The second case quoted was *Reg. v. Rhodes* (2), which occurred in the time of Lord Chief Justice Holt. That was an indictment for subornation of perjury; there were several assignments of perjury. The defendant was convicted of the offence. "But then," said the counsel for the defendant, "some of those assignments of perjury

(1) 2 B. & Ad. 75.

(2) Ld. Ray. 886.

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are bad, and therefore the judgment is bad, because general." That was in arrest of judgment *also. But I should have answered him, as I think Lord HOLT did answer him upon that occasion—for that is the meaning I ascribe to what he says, and I know it is a course which we have taken very recently, "The question is a question of perjury; it does not signify how many assignments there are; there may be twenty which are bad, and only one which is good; but you still convict him of subornation of perjury. It is no separate finding. It is not for 'his said several offences,' but for his one single offence of subornation of perjury; and whether the overt acts are more or fewer, or only a parcel of unmeaning words have been added, is perfectly indifferent as to making it a good judgment upon the only crime charged in the indictment." I think that this is an answer which entirely explains that case, and shows it to be of no application in the present instance.

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Then my noble and learned friend referred to the case of *Reg. v. Ingram and wife* (1): and what do your Lordships think that case was? It was a charge against a man and his wife, that they were guilty of an assault. There was a motion in arrest of judgment. The objection was something of a grammatical nature. In the first part of the indictment the singular number was used, *insultum fecit* (all the indictments at that time were in Latin); upon which the grammarians who defended the parties said, "This is a bad record, because the *insultum fecit* (that is, made an assault), only applies to some one of those two, and we do not know which." But however bad the grammar, or however doubtful the charge, the following words were correct and perfectly clear, and touched both defendants. The same count, there being only one, proceeded to say "*vulneraverunt *et verberaverunt*." A little bit of false grammar which comes in before is of no consequence at all, with reference to the punishment of those who have been convicted of the offence well and grammatically laid. Chief Justice PARKER said upon that occasion, "If any part of the count is good, the whole is good," and so it is; yet that case is quoted to prove a judgment good which rests on two counts, one good and one bad. And those two are the only cases before the time of Lord MANSFIELD, which are now quoted as establishing his position, stated by him in a civil action, not distinctly upon the point in question, but antithetically, as serving to illustrate the supposed absurdity of the rule in civil cases. I admit that cases come afterwards which

require some explanation ; but the first explanation is to be found in the general language which was employed by so great an authority upon this subject, and a want of examination of what the principle really was. My learned brother Mr. Baron PARKE was exposed to some censure for expressing more doubt than seems to be quite consistent with his holding a strong opinion on this point : perhaps he may have done so ; still that opinion is quite plainly to be discovered. Even if we could believe it possible that he was not convinced by his own lucid exposition, it cannot fail, I think, to convince anyone who brings an unbiassed mind to the question.

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Then, my Lords, we come to the case of *Rex v. Hill* (1), and which, in my opinion, has really no application whatever to this subject. The party was there found guilty of an offence at the Assizes, the same offence being stated in six or seven different counts. The question was, whether all those counts were not bad ; and Mr. Justice CHAMBRE, *the learned Judge who tried the case, when the prisoner was convicted, passed a sentence upon all the counts which a conviction upon any one of the counts would have warranted ; but he said, " I will reserve this point for you." The mode of proceeding there was a matter of arrangement between the counsel and the Judge at the trial. What was the arrangement ? Why, that if all the counts were bad, the prisoner should be pardoned ; but if any one count was good, the prisoner was to undergo his sentence, for any one was sufficient to warrant the punishment. From that it is inferred, that had a writ of error been brought upon a judgment upon all those counts, the judgment would have stood, notwithstanding five or six were bad. I do not know how the judgment was entered ; but I know the reservation was, " He is convicted upon condition that I find one good count. On condition that all the counts are not bad, the conviction stands, and there is an end of it." I have no reason to doubt that the judgment was properly entered. I am quite sure, if I had tried the case, it would have been so ; because it is my constant practice, and I believe that of several other Judges, to take care that, with their knowledge, no judgment shall ever be entered for the Crown upon a bad count.

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In *Rex v. Mason*, the judgment was arrested because all the counts were bad. That case requires no other comment. In *Young v. Rex* (2), however, a difficulty, I admit, arises, because there the punishment was discretionary. The Court might have pilloried,

(1) 1 Russ. & Ry. C. C. 190.

(2) 1 R. R. 660 (3 T. R. 98).

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or imprisoned, or transported. The Judges there thought proper to transport; and I agree with the observation which has been just made, that though if they were to transport, it could only be for the term of seven years, they must have exercised a discretion *in electing that mode of punishment, and that therefore they did pass sentence upon an indictment which appears to have been wrong as respects two of the counts: a sentence which was affirmed on a writ of error. According to my argument, I agree that that judgment was wrong. I agree also, that to the answer "the objection was not taken," it is a strong reply, that that learned Court and the eminent counsel employed would have been very likely to take it if well founded. But I must apply my brother PARKE's observation, that it is perfectly clear that upon that indictment (as in *Rex v. Powell*) the several counts were only several descriptions of one set of facts; and though that may not be properly discoverable from the record, still, in point of substance and effect, proof of those facts warranted the sentence.

So where a felony was established, requiring capital punishment or transportation for life, the number of counts could make no difference, because the punishment pronounced upon any one of them exhausted the whole materials of punishment, and admitted of no addition. The effect is a judgment for one felony stated in various forms, not for a variety of misdemeanors described as "his said offences."

The case of *Young v. Rex*, or rather the course which was not resorted to in that case, constitutes really the whole strength of authority relied on by the Crown in this argument. It is said, "This point, if available, should have been taken, but was not taken." I can only explain it by the current notion that one count alone would support any sentence applicable to the offences stated in the whole indictment; and can only account for that notion by Lord MANSFIELD's general words, needlessly and inconsiderately *uttered, hastily adopted, and applied to a stage of the proceedings in which they are not correct in point of law.

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My noble and learned friend on the woolsack denied all distinction between the proceeding by arrest of judgment and that by writ of error, for the purpose of the present debate. And it is curious that the learned reporter, in his marginal note to this case of *Young v. Rex*, says that the Judges refused to arrest the judgment, though in fact they refused to reverse it on writ of error. The identity of the two proceedings is assumed—an

assumption which shows the hasty manner in which opinions are occasionally taken up. The difference is, however, palpable. In the former case the Court abstains from pronouncing judgment upon any count that may be deemed erroneous; the judgment may, however, be properly entered up on such counts as are good: in the latter, the judgment, having already been finally entered up, cannot stand if it rest on any materials which are vicious in point of law. "But what absurdity," says my noble and learned friend (Lord BROUGHAM) "to suppose that a Court should refuse to arrest the judgment on a bad count, and yet leave the bad count on the record; so that, when judgment was entered up on that record, the vice of that one count should be left to subvert it altogether!" I should rather suppose that care would be taken to forbear from entering up judgment on the bad portion of the indictment; and if the prosecutor should perversely so enter it up, I cannot doubt that the same reasoning which has convinced myself, and others of more authority, would have induced the Court to decide against it, if the objection had been pointedly propounded.

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It is admitted on all hands that this question is *res integra*, as far as decisions are concerned. We must then weigh the principle, and I find it wanting: it is inadequate to support the loose and censurable practice which some of the learned Judges have described as prevailing. To pass a sentence for three offences, where a party is well convicted of only two, cannot be right. And let it be observed, that I do not seek to control a discretion exercised on the proper subjects of that discretion: I merely hold it wrong to punish, in a case where no punishment is lawful. The judgment is not severable, and if partially wrong, must, for that reason, be wholly reversed, on the very same unquestionable principle which must be applied to civil cases. The sentence in the one, and the damages in the other, stand on the same footing, the moment it is clear that the judgment is general, and proceeds upon all the counts.

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Another objection to this mode of giving judgment has been adverted to. It is observed that the party will not be able to defend himself in case of a second charge against him, of the facts so imperfectly stated in the bad count. Suppose he pleads, "I have been already punished for this." The answer will be, "No; you have not been already punished for this, because the offence was laid in an imperfect count, and the law presumes that no punishment

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was inflicted upon you in reference to that bad count." What is the answer given to that argument by one of the most acute, and learned, and candid persons that I have ever had the good fortune to co-operate with in the whole course of my life? an argument, let me observe, not stated with any doubt or difficulty by my learned brother Mr. Justice COLTMAN, whose *plain and manly understanding brings it before your Lordships in a way that cannot be misunderstood. He says, "It is injustice if a punishment is to be passed which will not protect the party from future punishment from the same set of facts." Is it not so? Why, what is the answer given by Mr. Justice PATTESON to that argument? He says, "It cannot lie in the mouth of the prosecutor to say that defendant was not convicted on the bad counts of the former indictment; for the former conviction remaining unreversed is a good conviction, be the counts never so bad." My noble and learned friend on the woolsack, quoting this passage from my learned brother, observed, "The Crown would be estopped from denying that he had been so convicted;" well convicted, it should then seem, of that which is no offence, and punished for that no offence, in spite of the presumption so much descanted on.

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It is, however, no easy matter to estop the Crown in any of its legal proceedings. The difficulty is greatest in criminal prosecutions, where any one may employ the name of the Crown in accusing and bringing to trial. And what is to estop the Crown in the case supposed? The fact of the party having been adjudged guilty of this offence. Yet the whole argument has been to show that, as this offence was ill laid in the indictment, you must presume that no such judgment could have been pronounced. I confess, however, that "estoppel" is to me a word without meaning, if this judgment now under investigation can be maintained by the reasoning adduced in support of it: for how could that doctrine at any time, and under any circumstances, apply more strongly than at the present moment, when the first law officer of the Crown in Ireland is not estopped *from attacking that indictment, preferred by himself, on which, in all its parts, he has obtained a verdict of guilty, and a sentence of fine and imprisonment?

Let me here observe upon what appears to me another striking inconsistency. You are to assume that it is too difficult for the Judge to give his mind to the subject at the moment of trial, and at the same time you are to say that he took care to confine his judgment strictly to those counts that were good in point of law. And

this was even urged as the main reason for allowing the judgment to be general; and yet, when that general sentence has been passed, however defective it may be proved as to part of its foundation, the court of error must support it on the presumption that the Judge did form that opinion, and discriminate between the good counts and the bad.

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My Lords, I state again, that the argument upon this point has overpowered me, not only at the first moment by its novelty, but with its complete demonstrative force, when I now, upon full reflection, come to examine the ground upon which it rests; and I take up, therefore, the principle upon which alone my noble and learned friend has most truly said that we can properly set aside the judgment of the Court below: namely, that nothing short of conviction, amounting to absolute certainty, will justify your Lordships in declaring that what was done below is not properly and duly done.

My Lords, regarding, as I do, the Court of Queen's Bench in Dublin with the greatest respect which it is possible to feel for any Court, being quite aware of the great talents and endowments which adorn the Judges who sit there; and feeling, if possible, a still greater degree of confidence and veneration towards *my learned brethren with whom I am in the habit of daily acting, whom I regard with warm attachment, and on whose opinions I place the highest value; differing, with feelings of regret and distrust, from my noble and learned friends who have now preceded me; still, acting here as a Judge for myself, and bound by my duty to exercise my own understanding upon the reasoning which is brought before me, I am fully convinced that the judgment is not good in point of law, and must vote against the motion which has been made by my noble and learned friend.

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LORD COTTENHAM :

I quite concur in the observations which have been addressed to your Lordships by my noble and learned friend, as to the difficulty in which any member of this House is placed, who feels himself called upon to advise your Lordships to come to a decision adverse to the opinion of a great majority of the Judges. The opinion expressed by such a majority, ought to make any one extremely cautious in coming to a conclusion opposite to what has been so expressed. It ought to make one watch every step that one takes in investigating the subject, and to doubt every conclusion to which

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the mind may feel disposed to come, in order to be sure, that if you do come to a conclusion adverse to the opinion expressed by the majority of the learned Judges, at least you have exercised all the powers with which you are invested, in order accurately to ascertain whether you have come to a right conclusion. I have adopted that course : I have carefully considered all that has been addressed to your Lordships from the Bar, and all the reasoning suggested by the LORD CHIEF JUSTICE and the majority of the Judges in delivering their *opinions. I have hesitated upon every step of the reasoning which I thought it my duty to follow ; and having done so, I have come to the conclusion that the opinion expressed by the majority is wrong, and that the opinion expressed by the minority of the Judges is the right one. Having come to that conclusion, I apprehend there was but one course that was open to me : I apprehend that it was my bounden duty to act upon the opinion I had so formed, and to state to your Lordships the grounds upon which I had formed it.

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My Lords, the assistance of the learned Judges is sought for in order to inform your Lordships, in order to assist the House in coming to a right conclusion upon the matter ; and undoubtedly their opinions are entitled to the greatest weight ; and no opinion ought to be formed adverse to that which they express, without the greatest care and hesitation. But they are not to bind the House ; they are merely to assist the House ; and no doubt, I apprehend, can be entertained, that it is the duty of those members of your Lordships' House, who from professional habits are justified in stating their opinions upon any matters of law that may come under the consideration of this House, after having taken all possible pains to come to a right conclusion, to state their opinions, and to act upon them. Undoubtedly, if there should be any doubt upon the mind of any one upon a subject of this kind, it would be most materially relieved by the case which my noble and learned friend who last addressed the House adverted to (1), in which my noble and learned friend himself, and my noble and learned friends near me (LORD BROUGHAM and LORD CAMPBELL), thought it their duty (and I think they *had a perfect right to do so), not to disregard the opinions expressed by the unanimous voice of the Judges in that case, but, yielding to them all the weight which properly belonged to them, having been unable to concur in those opinions, to advise the House to adopt a conclusion directly contrary to that

(1) *Reg. v. Millis*, 59 R. R. 134 (10 Cl. & Fin. 534).

at which the learned Judges had arrived. It was my fate upon that occasion to concur in the unanimous opinion of the learned Judges; but one-half of the learned Lords who expressed their opinions upon that subject were of the contrary opinion; and it was only by the rule of the House giving effect to the negative where the numbers are equal, that the judgment of the House was decided. The only difference between the two cases is this, that the opinions formed and expressed by my noble and learned friends were in that case against the opinions of all the Judges; here it is an opinion formed and expressed by me, and those noble and learned Lords who agree with me, against an opinion expressed by a large majority of the Judges.

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Upon one part of this case, to which my noble and learned friend who last addressed the House adverted in the opening of his address, it is not my intention to express any opinion; and I only refer to it now for the purpose of guarding myself against any supposition, from my not discussing that part of the case, that I have formed any opinion adverse to the case of the plaintiffs in error. I did not enter into a minute investigation of that part of the case, for this reason only, that having found in that question upon which the Judges are divided, sufficient in my opinion to regulate the course which I ought to pursue, I thought it unnecessary to investigate a point upon which the Judges had expressed a unanimous opinion. I will, however, say this, that if the judgment in this part *of the case be right, it brings forward this very strange proposition, that there is no remedy for an acknowledged wrong of great magnitude; for you are bound upon that part of the case to look at the facts as they appear upon the challenge, the demurrer, for the purpose of argument, and for that purpose only, admitting the facts as they are there stated. The judgment of the Court is this; that upon the facts as they are there stated, there is no means of doing justice. That a great injustice, according to the statement of facts, has been done, cannot by possibility be matter of dispute. My Lords, if it were necessary to investigate the case, I cannot doubt that we should find that so great a wrong is not without remedy; but I mention this only for the purpose of guarding against the supposition that I have formed any opinion upon that part of the case, contrary to what my noble and learned friend has expressed to the House.

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The only part of the case upon which I propose to address to your Lordships any observations in detail, is as to the effect to be

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given to the opinions of the learned Judges, who were unanimous in thinking that the first, second, third, fourth, sixth, and seventh counts in the indictment are to be rejected; the two last because bad in themselves, and the four others because, the findings being bad, no judgment could properly be passed upon them: but a majority of whom have nevertheless given their opinions, that the jury having found the defendants guilty upon each of these counts, as well as upon others as to which no objection is made, the judgment and sentence of the Court, expressed to be for "his offences aforesaid," cannot on that account be impeached upon a writ of error.

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The rule of law upon which we are called upon to *decide, cannot be affected by the consideration of the nature of the counts we are compelled to reject, and those we find to be good; but it may be useful, in illustration of the importance of the present question, to look to the indictment, and to compare the whole of it with the part which will remain after rejecting the first, second, third, fourth, sixth, and seventh counts.

The question we have to consider is, whether there be error upon the record; and for this purpose, if we read the record, as we should any other document, and only give to the words we find there the construction they would receive if read in any other instrument, we find it distinctly stated, that the defendants were charged in the indictment with the several offences specified in the several counts, that the jury found verdicts of guilty upon all and each of them, and that each defendant, "for his offences aforesaid," was sentenced to punishment. Did not the Court below pass sentence upon the offences charged in the first, second, third, fourth, sixth, and seventh counts, as well as upon the offences charged in the others? The record of that Court tells us that it did; and if our duty be to see whether there has been any error apparent upon that record, and if we adopt the unanimous opinion of all the Judges that those counts, or the findings upon them, are bad, so that no judgment upon them would be good, how are we to give judgment for the defendant in error, and thereby say that there is no error in the record?

The only answer which has been given to this objection appears to me to be not only unsatisfactory but wholly inadmissible. It is said we must presume that the Court below gave judgment and passed sentence only with reference to those counts as to which, *or as to the finding upon which, there was no objection. This would be to presume that which the record negatives. The Court

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below, by its record, tells us that the sentence upon each defendant was for "his offences aforesaid," after enumerating all those which were charged in the indictment. Can we assume that this statement is false, and that the sentence was only upon one-half of those charged? No authorities have been cited for such a presumption; and without referring to the accuracy and strictness required in criminal proceedings, the language of the record, and its natural and obvious meaning, in my opinion, negative it. Before we raise this or any other presumption, it would be well to consider how very probable it is to be contrary to the fact. We cannot look out of the record for the purpose of ascertaining what may have taken place in the proceeding which does not appear upon the record; but it is no improbable supposition that the errors alleged to affect certain counts, and the findings upon them, were brought under the consideration of the Court below upon a motion in arrest of judgment, and that the Court below held the objections not tenable. Yet in such a case we should be presuming that the Court below had, in passing sentence, entirely rejected these several counts, contrary to the fact. We can only look to the record as to what passed in the Court below; and as that informs us that the sentence was passed upon all the offences of which the jury found the parties guilty, we cannot adopt any presumption contrary to what is so stated. It would be a presumption of a fact not capable of being repelled, though contrary to what was known to all to be the truth.

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The argument supposes the Court below to have *been right in all particulars; but the impossibility of doing so upon this record was so strongly felt that another argument was resorted to, not very consistent with the first, as it assumes that the Court may have been wrong upon every count but one. It is this: that a court of error has only to see that there is some one offence properly charged, and a punishment inflicted applicable to such offence; and that being found to be so, it is immaterial that as to all the other counts the Court below was wrong, all such other counts, or the findings upon them, being bad. Now there are some punishments, such as imprisonment, applied to so large a range of offences that the restriction of requiring a punishment applicable to the offence will not avail in any material degree to limit the general application of the rule. It makes, indeed, a marked distinction between offences for which the punishment is prescribed by statute, and the generality of others; which ought not to be. But consider what this proposition is: All the counts in an indictment for misdemeanor are

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supposed to apply to different offences. They often do so, and always may. The prosecutor has the option of preferring separate indictments for each, or of joining all in one. If he adopts the former course, he must show the indictment right in each, to support the sentence. If he joins all in one, and one sentence is pronounced upon all, he can, according to the proposition contended for, support the sentence, although all the counts are bad but one, which may apply to the most insignificant offence of the whole. A court of error has, it is said, in such a case no right to interfere; that is to say, it cannot correct error unless the error be universal, no matter how important the error may be, or how insignificant the part which is right, or what may have been the *effect of such error. The proposition will no longer be, *in nullo est erratum*, but that the error is not universal.

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If neither of these arguments prevails, there is manifest error upon the record; and it is not for a court of error to enter into any consideration of the effect which such error may have produced. It has no power to alter the sentence, and can form no opinion of the propriety and justice of it from mere inspection of the record, which is all the judicial knowledge it has of the case. Upon what ground is it to be assumed, in any case, that the Court below, if aware of the legal insufficiency of any of the counts, or of the findings upon them, would have awarded the same punishment? In many cases it probably would do so, but in many it as certainly would not. If the several counts were only different modes of stating the same offence, the failure of some could not affect the sentence; but if the different counts stated, as they well might, different misdemeanors, and after a verdict of guilty upon all it was found that some of the counts, that is, some of the misdemeanors charged, must be withdrawn from the consideration of the Court by reason of defects in the counts or in the findings, it cannot, in many cases, be supposed that the sentence would be the same as if the Court had the duty thrown upon it of punishing all the offences charged. This is well illustrated by a case stated at the Bar: Supposing an indictment for two libels in different counts, the first of a slight, the other of an aggravated character, and verdict and judgment upon both, and the count charging the malignant libel, or the finding upon it, held to be bad: Is the defendant to suffer the same punishment as if he had been properly found guilty of the malignant libel?

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The reason given for the rule that judgment will not be arrested

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in a criminal case if there be one count good, though others may be bad, assumes that the punishment would be different. In *Rex v. Benfield* (1) it is said, "The Court will give judgment for the part which is indictable." If the sentence be of a nature to be applicable only to the count found to be bad, I understand it to be admitted that the judgment must be reversed. In that case it would be clear that the Court has given judgment upon the bad count as well as upon the good one. But what then becomes of the presumption that the Court rejected the bad count? It must be answered, that the presumption in that case is repelled by the record itself: and is it not equally so when the record states that the judgment was upon all the counts, bad as well as good? Is it not just as much alleged in such a case that the sentence was applied to all the offences charged, as, in the case put, that it was applied to the offence to which the particular punishment was applicable?

It being ascertained that this question is entirely new, and that there is no case in which it has been decided, our judgment must be regulated by the reason of the thing, or by analogy to principles adopted in other matters, if any can be found applicable to the case. Two have been referred to: first, on the part of the Crown, that, on motions in arrest of judgment in criminal cases, the motion is always refused if there be any one good count to support the verdict; secondly, on the part of the defendants, that, in civil cases, the rule is directly the reverse, and that, if there be any one bad count, no judgment can be given. Upon considering these two classes of *cases, it appears to me that the second class is, by analogy, directly applicable to the present, and ought to govern it, and that the first has no application to it, for the reason given; for the rule assumes that, after judgment, the opposite rule ought to prevail. I have already referred to *Rex v. Benfield*, in which the Court, after saying that, upon indictments, the Court will give judgment upon that part which is indictable, observes, that "it is not like the case of an action where general damages are given, and one of the counts appears to be bad, in which case the plaintiff in the action cannot indeed have judgment; but the reason why it is so in actions, does not hold in indictments or informations;" and after holding that the second count was libellous, the Court said, "that if it had not been so, it would, in an information or indictment, only go towards lessening the punishment, but would not be a sufficient reason for arresting the judgment."

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Here we have the reason given why the rule in civil actions does not only apply to motions in criminal cases, in arrest of judgment; because the Court, having the sentence in its own hands, will give judgment upon that part which is indictable, and the failure of part of the charge will go only to lessening the punishment. These reasons have no application to writs of error, on which the Court cannot confine the judgment to those parts which are indictable, or lessen it as the different charges are found to fail. In *Reg. v. Rhodes* (1), Chief Justice HOLT gives a similar reason. He said, that all the assignments of the perjuries were wrong but one, yet that would be sufficient for the Court to give judgment upon against the defendant. These were both motions in *arrest of judgment. So in *Reg. v. Ingram* (2), Chief Justice PARKER said, "In a civil action, where one part of the declaration is ill, and the jury find entire damages, the judgment must be arrested, because the Court cannot apportion them; but in indictments the Court assesses the fine, and will set it only according to those facts which are well laid."

Much reliance was placed upon the observations of Lord MANSFIELD in *Grant v. Astle* (3), and *Peake v. Oldham* (4). But it is obvious that he was alluding to motions in arrest of judgment. In the latter case he speaks of there being one count to support the verdict, the rest being bad; and in the former case he says, "In criminal cases, where there is a general verdict of guilty on an indictment consisting of several counts, if any one of them is good, that is held to be sufficient; but in civil cases the rule is now settled, and we have gone as far as we can by allowing verdicts in such cases to be amended by the Judge's notes." In both cases Lord MANSFIELD expresses his regret that the rule in civil cases was not the same as in criminal cases, but he does not say in what manner that would be practicable. The rule has always been considered as indispensable. The functions of the Court and of the jury could not be properly maintained if it were the same in civil as it is in criminal cases. Both these were civil actions, so that the observations of the Court as to criminal cases can merely be considered as *dicta*.

Young v. Rex (5) was relied upon on behalf of the Crown, as approximating, if not as amounting, to a decision upon the point.

(1) 2 Ld. Ray. 886.

(2) 1 Salk. 385.

(3) Doug. 750.

(4) Cowp. 276.

(5) 1 R. R. 660 (3 T. R. 98).

I have very carefully *examined that case; and it appears that the point, if it arose in the case, was not raised at the Bar or alluded to by the Court. It is true that it was contended that the two last counts were bad, upon the authority of *Rex v. Mason* (1); but there is nothing to show that the Court held them to be so; and there is neither argument nor judgment to show what would be the effect of their being so considered. I have that case now before me; and though the objection as to the invalidity of the two last counts appears to have been raised by counsel, referring to the case of *Rex v. Mason* in support of the objection, so far was the Court from entering into that part of the case, that Lord KENYON is represented as having said, "in this case the judgment upon all the counts is precisely the same; a misdemeanor is charged in each." It is quite impossible therefore that Lord KENYON could have come to the conclusion that the two last counts were bad. He may not have intended to express any opinion upon it; but it seems rather that his mind was directed to the objections made to the earlier counts, and did not advert to the objection made to the two last. It is impossible that he could have said that the judgment on all the counts must be the same, if he had had under his consideration at that moment the fact that the two first counts were bad, according to the previous decision.

Rex v. Fuller (2) was a motion in arrest of judgment in a criminal case, and only proves, what is not disputed, that in such cases it is sufficient if there appear to be any one good count upon which judgment may be pronounced; Baron PERRYNS saying, that in the circumstances in which the prisoner stood convicted upon the first count, to which no sufficient *objection had been taken, and upon which therefore judgment must be pronounced, it was not absolutely necessary to pronounce upon the objection. *Angle v. Alexander* (3) only shows the rule in civil cases, and *Rex v. Hollingberry* (4) the rule in criminal cases before judgment, about which there is no doubt, and neither of them throws any light upon the present question.

The case which comes nearest to a recognition of the rule contended for by the Crown is *Rex v. Hill* (5), because in that case there had been a conviction and sentence passed upon the circuit, and questions were reserved for the opinion of the Judges, that, if

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(1) 1 R. R. 545 (2 T. R. 581).

(2) 1 Bos. & P. 180.

(3) 7 Bing. 119.

(4) 4 B. & C. 329.

(5) Russ. & Ry. C. C. 190.

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they should find all the counts bad, there might be a pardon. They found all good but one. The Judges who came to this conclusion had nothing to do with the result of the opinion they expressed; but the terms in which the question was reserved implies an impression at the time upon the mind of the Judge upon the circuit, that if any count was found to be good, the judgment would not be affected. The case certainly goes no further than this; and it therefore proves only what the learned Judges have informed us, that such an impression has existed generally in the profession; a circumstance certainly in general not to be disregarded. When, however, it is found that such an impression could not have arisen from decisions, for of them there is none, or from practice, for upon these particular points none seems to have existed, but the origin of it can safely be referred to a course of proceeding at first sight similar to the case under consideration, but found upon examination totally distinct from it, I mean motions in arrest of judgment, [*401] *I cannot think that any weight ought to be given to such an impression.

It appears from all these authorities, *dicta* as well as decisions, that the reason of the rule in criminal cases upon motions in arrest of judgment, that the motion will not succeed if there be any count good to support the verdict, is, that the Court, having ascertained, before it pronounces judgment, what counts are good and what bad, awards the punishment as it may think right upon the offences contained in the good counts, and in such cases it is stated to be usual to enter up the judgment upon those counts only; but that in civil cases, if there be one count bad, and the verdict general, no good judgment can be given, because the Court, having no power over the damages, or means of apportioning some part of them to one count and some to another, is compelled to consider the whole as bad.

It appears to me that a court of error is precisely in the same predicament. It has no more jurisdiction over the *quantum* of punishment, and no better means of referring one portion of it to one count, and one portion to others, than the civil Court has, after a general verdict, over damages, in an action. In both cases the preliminary or inferior jurisdiction has proceeded upon an instrument (the indictment or the declaration) found to be in part deficient; and having come to one result upon the whole, which the superior jurisdiction cannot separate or apportion, the same necessity exists in the one case as in the other, of holding the whole to be void.

It was urged that much inconvenience would arise from adopting his rule. If the rule, though never the subject of decision, be necessary for the due administration of justice, and be in conformity with established decisions in analogous cases, there could be no room for such a consideration; but I not only do not foresee the inconvenience anticipated, but feel satisfied that those which would arise from the opposite rule would far outweigh them, and be productive in many cases of great injustice.

The only inconvenience which could arise from the rule would be, that the prosecutor must be careful as to the counts upon which he means to rely. The evidence at the trial must afford him the means of making the selection, and the defendant has now the means of compelling him to do so. But what are the evils which may arise from rejecting the rule? A defendant, having received sentence for an offence with which he was not legally charged, or as to which there was no legal finding, would not have the means of being relieved from it. There being one good count in the indictment, he would in effect be deprived of the benefit of the writ of error. It is no answer that this is not likely to happen, because generally the different counts are only various modes of charging the same offence. It is certainly not improbable that it should happen, and it is sufficient that it is possible. So long as different misdemeanors may be included in the same indictment, the occurring of this hardship and injustice is obviously possible; and it is certain, if it should occur, that there would be no remedy for it. Added to this, there is the unanswerable objection, that a defendant might be convicted and punished for a misdemeanor, and again convicted and punished for the very same act, if the count in the first instance was not good, but joined with one that was so; as in that case he could not get relief against the judgment upon the bad counts in the first prosecution, or defend himself in the second by pleading his former conviction.

The rule contended for by the plaintiffs in error is, I think, founded in principle and necessary for the purpose of justice, and is in perfect analogy with the decisions in civil and criminal cases, so far as those decisions have gone. The opinion I have now expressed I formed early in the arguments at the Bar. I have carefully considered all that has been urged at the Bar, or suggested by the majority of the Judges, against it, but I have not found any reason for altering my original opinion.

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It is now my duty to state to your Lordships the opinion which, after great consideration, I have formed upon the questions of law raised by this record; and to these, of course, I shall strictly confine myself. In the first place, I have no doubt that there are various good counts in this indictment. A conspiracy to effect an unlawful purpose, or to effect a lawful purpose by unlawful means, is, by the common law of England, an indictable offence; and it is fit that, if several persons deliberately plot mischief to an individual or to the State, they should be liable to punishment, although they may have done no act in execution of their scheme. Where they have actually done what they intended to do, it may be more proper to prosecute them for their illegal acts; but, in point of law, they remain liable for the offence of entering into the conspiracy.

[*404] The first five counts of this indictment clearly charge the defendants with having conspired together to effect unlawful purposes. The fifth count was strongly objected to; but I consider that any person *who deliberately attempts to promote feelings of ill-will and hostility between different classes of her Majesty's subjects—to make the English be hated by the Irish, or the Irish to be hated by the English—is guilty of a most culpable proceeding; and that, if several combine to do so, they commit a misdemeanor for which they may be indicted and punished. I have entertained some doubt whether the eighth count does more than charge a design to show the inefficiency of certain tribunals, that others, more efficient, may be substituted for them by the Legislature, in which case it would be insufficient; although a conspiracy generally to bring into discredit the administration of justice in the country, with a view to alienate the people from the Government, would certainly be a misdemeanor. The subsequent counts appear to me unexceptionable.

I am clearly of opinion, that the plea in abatement was bad in form, if not in substance—for not giving the names of the witnesses on whose evidence the indictment is alleged to have been found—for not averring that there were not other witnesses, duly sworn, on whose evidence the indictment might have been found—and for not showing that the witnesses who were examined could not, on account of their religious profession, have been lawfully examined without being sworn at all.

I think the Court of Queen's Bench was fully authorized to

continue the trial in the vacation, and that the order for this purpose, though conditional, was quite sufficient; for if it had been absolute, it could only have operated upon the contingency of the trial not being finished before the expiration of the Term. At common law, the want of the entry of a continuance after the verdict, would have been *fatal; but the trial took place under the statute, and, in my opinion, the rule of the common law, requiring a continuance, does not apply.

The omission of an entry in the judgment, in respect of the facts of the indictment on which there was an acquittal, cannot be the subject of a writ of error, as the defendants cannot thereby be in any degree prejudiced.

The question raised by the writ of error *coram nobis*, is more doubtful. The assignment of error in respect of the witnesses not having been sworn in Court under 56 Geo. III. c. 87, is free from the defects which are fatal to the plea in abatement, and calls upon us to decide whether that statute, as to the Court of Queen's Bench in Ireland, is repealed by the 1 & 2 Vict. c. 37. Had this been *res integra*, I should have held, notwithstanding the general title and preamble of the latter statute, that, from the enacting clause, the finding of indictments in the Court of Queen's Bench was *casus omissus*, this Court being neither the Assizes nor Quarter Sessions; but when I am informed of the practice under it in Ireland, and I find a general intent in it which possibly may sustain that practice, I would rather advise your Lordships to consider that the witnesses were sufficiently sworn by the foreman of the grand jury. I have no difficulty in overruling *Mr. Steele's* point, that there is no statement written on the indictment of the names of the witnesses sworn; as the words of the statute on this subject must be taken to be merely directory.

I was, at first, much struck with the objection to the validity of the judgment, by reason of the form of the recognizance into which the defendant is required to enter; and I am by no means free from doubt *upon it now, although I am not prepared to say that it would be a sufficient ground for a reversal. It must be taken to be part of the sentence pronounced upon the defendant for the offences of which he has been found guilty, and it cannot be separated from the fine and imprisonment: so that, if it be clearly contrary to law, the whole would be vitiated. The defendant is ordered to enter into "a recognizance, with two sufficient sureties, himself in 5,000*l.*, and each surety in 2,500*l.*, conditioned

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to keep the peace and to be of good behaviour for the space of seven years next ensuing the acknowledgment thereof." I believe there is no precedent for such a recognizance, and it might lead to perpetual imprisonment. A recognizance required, in the common form, for a certain term from the sentence, or from the expiration of the imprisonment, could not be the means of detaining the party in custody beyond the term for which the recognizance was to be given, and at the end of that term he would be discharged, although no recognizance had been entered into. But here, the time when the recognizance would expire is left entirely undefined; and if the defendant cannot get two sureties to join him to the required amount, he must die in gaol. This is quite different from the payment of a fine, which depends upon his own act. Magna Charta provides that no fine shall be imposed beyond what the party is able to pay, and a court of error must presume that any fine which is imposed may be paid by him; but the Court passing sentence cannot ascertain, and does not attempt to ascertain, that others will be willing to become bound for the good conduct of the defendant; and therefore I think it ought, according to invariable usage, so to frame the sentence that, after having been in close *custody during the time for which the recognizance was to be given, the defendant shall be restored to his liberty. In this case the Court could not have meant that, in any event, the defendant should remain in gaol beyond the seven years; yet, from the language employed, the period of imprisonment may be indefinitely prolonged. Lord Chief Justice TINDAL, in delivering the opinion of the Queen's Judges on this point said, "The defendants have, under this sentence, the power to enter into the recognizance *instantly*, and thereby shorten the term for the suretyship to six years after the imprisonment has ended." But, with the most sincere deference for such high authority, I must be permitted to doubt whether the power is to be assumed of doing an act depending on the will of others over whom the party required to do it has no control.

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I feel still more difficulty when I come to the next question, by far the most important arising in the present case: for, while many of the others resolve themselves into mere technicalities, this touches the pure administration of justice, and is of the greatest interest to us and to our children. I mean the constitution of the jury by whom the defendants were tried. The facts we must take entirely from the challenge to the array. It has been truly said,

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at the demurrer to the challenge is not by any means an universal and absolute admission of the truth of the facts there alleged; but we are to take them as true, in considering the validity of the challenge. Now this statement shows most distinctly, that, through the designed violation of an Act of Parliament, the defendants were prevented from having a proper jury; and the only question is, whether a challenge to the array is a remedy which the law allows them? They say, by their challenge, that the Recorder of Dublin, having corrected and signed the separate jury lists, did not make out the general list, as he ought to have done, according to the statute, but (without imputing any corruption to him) "that a paper writing, purporting to be a general list made out from such lists, corrected and signed as aforesaid, was illegally and fraudulently made out by some person or persons unknown," and that this paper writing omitted fifty-nine persons, whose names are set out, who were duly qualified, and were in the lists so corrected and signed, and ought to have been placed on the general list from which the jurors were to be taken: that the jury book was made up from this fraudulent paper writing; that the list of special jurors for the current year 1844 was made from this book, omitting the fifty-nine names; and that the panel made and returned to try the issue between the Crown and the defendants, was arrayed and constructed from the said list purporting to be the special jurors' list for the year 1844, to the manifest wrong and injury of the defendants. Having negatived any privity in this fraud, and averred that it was known to the clerk of the Crown and the Crown solicitor before the panel was arrayed, they pray that the panel may be set aside and quashed.

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Now if these facts are true, I consider it quite clear that the defendants ought not to have been tried by a jury so struck. We have not here a mere casual omission of names, without working any injury; but we have a positive averment, that there was a designed and fraudulent omission, and that thereby the defendants were prejudiced. So much they assert, and so much they would have been bound to prove if the challenge had been traversed. We are not told by the record how the prejudice was worked by the omission; but this prejudice must have been satisfactorily established, or the issue upon the traverse must have been found for the Crown. Still it is possible that a challenge to the array may not be the appropriate remedy; and the Queen's Judges forcibly point out, that the ground of a challenge to the array has hitherto been "the

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unindifferency or default of the sheriff," and that here no blame is imputed to the sheriff. But though this answer is entitled to great weight, I cannot say that it is satisfactory to my mind. At common law, the whole execution of the jury process was committed to the sheriff, and there could be no miscarriage in this stage of a suit, unless through his unindifferency or default. A personal charge against him, therefore, was the ground of the challenge, and this being established, the coroner or elisors were substituted, to whom fresh process was awarded. By the modern Jury Act, the sheriff is entirely superseded in these functions, and a different machinery is provided for the due formation of juries. There being hardly any longer the possibility of any complaint against the sheriff; was it intended by the Legislature that the subject should be left without a remedy, to which, as of right, he might resort, if now, through the gross negligence or corruption of others, a panel of jurors should be illegally returned, from whom the parties cannot expect equal justice? I conceive the principle of the common law to be, that under such circumstances, upon a challenge to the array, the panel shall be quashed; and this principle would apply where the panel is framed by new functionaries, just as much as when all was left to the sheriff, although the form of ulterior proceeding would be varied. No other remedy is suggested; and, after the able and astute speech of my noble and *learned friend the LORD CHANCELLOR, we may safely assume than no other remedy can be suggested. A challenge to the polls would be unavailing where the objection is to the body of the panel, and in the present case would be utterly useless, the objection being, that names allowed and adjudicated upon by the Recorder are omitted. I think you cannot refer a party so aggrieved to the discretionary jurisdiction of the Court, to be exercised summarily, without trial by the country, and without power of appeal. A motion to quash the panel would be attended with equal difficulties, and might receive a similar answer.

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The learned Judges say, that "No object or advantage would have been gained if the challenge had been allowed; as in that case the jury process must have been directed to some other officer, who would have been obliged to choose his jury out of the very same special jurors' book." But I must be permitted to take an entirely different view of the duty of the Court of Queen's Bench, had the challenge been allowed. There being no complaint against the sheriff, there would have been no ground for superseding him.

The Court, I conceive, would have given redress according to the nature of the grievance. Seeing that the vice lay in the jurors' book, they would have directed the necessary steps to be taken to have it reformed ; and if this was impossible, and a fair jury could not be struck by consent, they might have directed the panel to be taken from the jury list of the preceding year, the statute authorizing this step, where, for the current year, no sufficient jury list has been framed. It has been said that the jury list of the former year could not be resorted to, because a list *de facto*, though a defective one, had been made up for the present year ; but if it is not *made up according to the statute, it is to be treated as a nullity.

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The proceeding I suggest would be new ; but it seems to be inevitably required by the new statute altering the mode by which juries are returned. Let me remind your Lordships of the convincing answer given by the Judges to the want of a continuance on the record after the verdict ; that the old common-law mode of entering a continuance was incidentally abrogated by the statute which allowed a trial at Bar in vacation. The same principle, in my humble opinion, would now authorize the Court to quash the panel, and to do what is necessary for assembling a fair jury, although no complaint is or can now well be made in respect of the unindifferency or default of the sheriff. Unconvinced by the reasoning of the learned Judges, still I should hardly have ventured to advise your Lordships to reverse the judgment merely on the ground that the challenge to the array was overruled ; although, after hearing the admirable observations made on this point by my noble and learned friend the LORD CHIEF JUSTICE of England, and knowing that I have the concurrence of that very acute, learned, and cautious Judge, Mr. Justice COLERIDGE, I entertain little doubt that the challenge ought to have been allowed.

But I now come to considerations which induce me without hesitation humbly to give your Lordships this advice. The learned Judges are unanimously of opinion that the sixth and seventh counts of the indictment, stating generally conspiracies to effect changes in the Government and a repeal of the legislative union, by intimidation and a display of physical force, are bad ; and I am clear that they are so, as they give the defendants no information of the specific *offences which they have to answer. Again, the learned Judges are unanimously of opinion that the findings of the jury on the first, second, and third counts of the indictment,

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are contrary to law; and I am clear that they are so, as the defendants are on each count found guilty of several conspiracies, although only one is charged. A very learned Judge, Mr. Justice PATTESON, thinks that all that follows the finding of the first conspiracy on each, may be rejected as surplusage; but there seems the greatest difficulty in giving effect to the first, more than to the second finding; for each of them standing alone would be regular, and little importance can be ascribed to the order in which they are supposed to be delivered by the jury. All the other Judges think that these findings are wholly bad, and that no judgment could be supported by any of them.

Then, can the general judgment stand, professing to proceed on the bad counts and the bad findings, as well as on other good counts and good findings? Agreeing with Mr. Baron PARKE and Mr. Justice COLTMAN (and I think it most unfair to try to discredit them by any expressions of diffidence which either of them may have used out of respect to their brethren from whom they differed), my opinion is, that part of the punishment must be taken to be awarded in respect of the supposed offences charged in the sixth and seventh counts, which do not amount to offences in point of law for which the defendants are answerable; and part in respect of the offences duly charged in the first, second, and third counts, of which they have not lawfully been found guilty.

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This is clearly the language of the record, to which faith must be given. After setting forth the eleven counts of the indictment, with the findings upon each, *repeating in so many words the charges in the first three counts, it thus proceeds: "Whereupon, all and singular the premises being seen and fully understood by the Court of our said Lady the Queen now here, it is considered and adjudged by the said Court here, that the said defendant, for his offences aforesaid, do pay a fine," &c. There is no *nolle prosequi* as to the bad counts, and nothing to prevent the judgment from applying to the defective findings, or the counts on which there was no lawful verdict; because all the counts and all the findings were believed in the Court below to be sufficient. Therefore, according to the plain use of language and the common sense of mankind, by this judgment the defendants are punished for charges which do not amount to crimes in the eye of the law, and for crimes of which they have not been lawfully convicted.

But with respect to the bad counts, it is said there is a rule of law, that if there be any one good count in an indictment, which,

standing alone, would support the judgment, it is not vitiated by any bad counts on which it likewise proceeds, and that we must presume that the Court below awarded the whole of the punishment in respect of the good count alone. I must say that it would be very strange if there were any such binding rule, for it would be quite contrary to the analogy of our law, and it might lead to great hardship and injustice. There is a clear distinction between an indictment consisting of one count sufficiently charging an indictable offence, with some irrelevant matter in it, and an indictment containing two counts charging separate offences, one being good, the other bad. The irrelevant matter in the good count is to be wholly disregarded, and no advantage can be taken of it; *utile per inutile non vitiatur*: but the separate count is considered a separate indictment. There may be one plea to the one count, and another plea to the other. There may be a demurrer to the bad count, and in that case there is no dispute that the opinion of a court of error may be taken on its validity. After verdict there may be a motion in arrest of judgment on the bad count, though sentence would be passed on the good count. The LORD CHIEF JUSTICE has given a remarkable instance of this, in the case of *Reg. v. Feargus O'Connor* (1); in which a motion in arrest of judgment was made upon one count, and the Court gave a separate opinion upon that count.

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But we are told that if the motion in arrest of judgment is improperly overruled, and sentence is passed upon the defendant, and he is punished for the supposed offence in the bad count, as well as the real offence in the good, he is entirely without remedy. The presumption that the Court below must be taken to have known which counts are good and which are bad, and to have awarded punishment only in respect of the good counts, is wholly at variance with the spirit of our jurisprudence, which supposes that Judges are fallible; and anxiously provides the means of correcting their mistakes, by motions for new trials, bills of exception, writs of error, and appeals. Such a presumption would sometimes be a presumption, not only contrary to the record, but contrary to the fact; as in this very case, in which it appears by the reports that all the Judges of the Court of Queen's Bench in Ireland held the sixth and seventh counts of the indictment to be unexceptionable, and could not have excluded them from consideration in meting out the punishment.

(1) See *ante*, p. 183.

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It is an utter mistake to suppose that there is only one *corpus delicti* which is made the subject of several counts in one indictment. Even with respect to felony, the law supposes a separate offence to be charged in each count; and in misdemeanors there are not unfrequently in the different counts entirely different offences—of different sorts—committed at different times; as in *Rex v. Benfield* (1), for riots and libels. Therefore the following case, according to the doctrine contended for, may well happen: There may be an indictment containing two counts for separate offences, A. and B.; A. being a good, and B. a bad count. The Judges in the Court below may think B. good, and A. bad, and sentence the defendant to a heavy punishment merely in respect of B., which may be connected with killing game, and attended, in their estimation, with great moral turpitude, though the matter charged may not really amount to an offence in law. On a writ of error, the Court above clearly sees that B. is a bad count, but cannot reverse the judgment, because there is count A. in the indictment, and though only for a common assault, would support the heavy fine and imprisonment imposed in respect of count B. I may suppose another indictment, with two counts, and a separate demurrer to each count overruled; with a general judgment that the defendant, for his offences aforesaid, shall be fined and imprisoned. Is it to be said, that if he brings a writ of error, and shows one count to be bad, he shall have no relief unless he show the other count to be bad also?

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Let us see what authority there is for a doctrine which would lead to such strange consequences. First, we are told of the opinion of the profession. I *have certainly heard it said very often, that if there be one good count in an indictment, it is sufficient, notwithstanding bad counts; and in a certain sense this is perfectly true. A defendant being convicted generally upon an indictment containing several counts, if one of them be good, he cannot get scot-free by a general motion in arrest of judgment; and it is most fit that he should be sentenced on the good count, although there may be bad counts in the indictments. I am aware that this notion has sometimes been carried further, to a writ of error; but without any principle, and without any decision to warrant it. The *dictum* of Lord MANSFIELD, so much relied upon, that “when there is a general verdict of guilty on an indictment consisting of several counts, if any one of them is good, that is sufficient,” is

perfectly correct; but he is evidently referring to a general motion in arrest of judgment, in the Court where the trial took place, and not in the slightest degree to a court of error. His lamentation, "that the rule prevails in civil cases, that where there are several counts in a declaration, and general damages, if one count be bad, there must be a new trial," is only lamenting what is as inevitable as fate, for all mankind must allow that it could not be overturned without working the most manifest injustice. Where there are bad counts in an indictment, with a general judgment, and bad counts in a declaration, with a general verdict, a court of error in the one case, and the Court below in the other, are placed exactly in the same predicament, being unable to distinguish what portion of the punishment, or what portion of the damages, is awarded in respect of the good counts and of the bad. I do not seek in the remotest degree to infringe or relax the rule in criminal cases which Lord MANSFIELD has laid down.

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Rex v. Mason (1), and *Young v. Rex* (2), are very properly cited; for they are cases in which the point might have been made, and was not made; but they prove no more. *Hill's* case (3) amounts absolutely to nothing, as the Judges had no authority to consider anything beyond the point reserved at the Assizes, whether there was any good count in the indictment. In *Rex v. Powell* (4), in which it was held that the word "misdemeanor," in a judgment, was *nomen collectivum*, and might apply to the offences stated in two counts of an indictment, the question we are now considering did not arise, and never was thought of at the Bar or on the Bench. There both counts of the indictment were good, the finding of guilty applied to both, and the sentence of hard labour must of necessity be ascribed to the count which would warrant it. The offence in the other count must be supposed likewise to have been taken into consideration in passing sentence, and a portion of the imprisonment may well be supposed to have been awarded in respect of it. Again, an indictment for perjury is not vitiated by one defective assignment, if it contains others which are sufficient; but the perjury charged is considered one offence, which the assignments are offered to substantiate, and one good assignment must suffice. The case where the question arose was only a motion in arrest of judgment, and does not apply to a writ of error. There is therefore no text-book, nor decision, nor *dictum*, to support a

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(1) 1 R. R. 545 (2 T. R. 581).

(3) Russ. & Ry. C. C. 190.

(2) 1 R. R. 660 (3 T. R. 98).

(4) 2 B. & Ad. 75.

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doctrine so entirely contrary to principle. To my utter astonishment, principle and authority failing, it is rested on the ground of expediency ; and if it were at all necessary to the due administration of the *criminal justice of the country, I should not resist it, however anomalous it may be. But not an instance has been put where serious inconvenience would arise from upsetting it. In an indictment for murder there may still be different counts varying the mode of committing the crime, or any other particular as to which the evidence may be doubtful. Although there may be a bad count in the indictment, sentence may without difficulty be passed on a count which is good.

I understand from my very learned friend Mr. Baron ROLFE, that upon a late trial before him for murder, after a general verdict of guilty, there was a motion in arrest of judgment, upon a suggestion that there was a bad count in the indictment. He did what might have been expected from him. Seeing that there was a good count in the indictment to which the evidence applied, he proceeded to pass sentence on that count ; and under similar circumstances, he will do exactly the same after this judgment is reversed. It is absurd to suppose, that when the Judge at the trial refuses to arrest the judgment, there being one good count in the indictment, he means that judgment shall be entered up on the good and on the bad counts indiscriminately, so that his judgment may be reversed by a court of error. If, from the gross carelessness of those employed to conduct the prosecution, the judgment is so entered up, it is not the judgment which he must be supposed to have pronounced, and it ought to be reversed. There is no pretence for the argument that, in refusing generally to arrest the judgment where there is a bad count, a judgment is necessarily pronounced which, according to the doctrine I contend for, must afterwards be reversed. Strictly speaking, where only one felony is proved, there ought to be a verdict of guilty only on one count ; but

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*in cases of felony it can seldom be worth the prisoner's while to avail himself of this right, and the present practice will not be at all affected. In cases of misdemeanor, more care may hereafter be required in framing indictments, and entering up verdicts and judgments ; but I have no hesitation in saying, that this would be a great improvement in criminal proceedings. According to the present loose system, the framer of an indictment, having got one count good in law, goes on to draw others more and more vague and attenuated, and requiring less and less proof ; till he involves

the accused in the most perplexing generalities, and there is the greatest difficulty in knowing what is the charge to be repelled. But even if bad counts are inadvertently introduced, the mischief of them may be easily obviated by taking a verdict of acquittal upon them, by entering a *nolle prosequi* to them, or by seeing that the judgment is expressly stated only to be on the good counts, which alone would prevent the bad counts from invalidating the judgment upon a writ of error.

With respect to the unauthorized findings, in which the jury have taken such unexampled pains to get wrong, and which present a question entirely new for your Lordships' consideration; it is admitted by all the Judges, except Mr. Justice PARTRON, that, if any punishment is supposed to be awarded in respect of any part of the first three counts, the judgment cannot be supported. But your Lordships are asked to presume, that the Judges of the Court of Queen's Bench in Ireland were well aware that there was no sufficient verdict upon any of these three counts, and awarded no punishment in respect of them. This again would be a presumption against the fact, as well as the averment of the record; for complaint was made by *the learned counsel for the Crown, at your Lordships' Bar, that no objection had been taken to these findings in the Court below; and it is quite clear that there was no misgiving respecting them in any quarter, till this writ of error was brought. In truth, these three counts contain the most serious charges, and several—such as a conspiracy to excite disaffection in the army—which are not repeated in any of the good counts on which there is a valid verdict. We cannot resort to the palpably incredible fiction, that the Judges, in violation of their duty, did not consider the guilt of the defendants aggravated by the charges in these three counts, and proportionally increase their punishment.

I allow that a court of error is wholly incompetent to inquire whether discretionary punishment for an offence of which the defendant is lawfully convicted is reasonable or excessive. But a court of error may, and is bound to inquire whether punishment has been inflicted for that which is no offence in point of law, or for offences of which the party has not legally been found guilty. I allow also, that your Lordships ought not to reverse a judgment unless you see distinctly that it is erroneous. But this judgment appears to me clearly to be erroneous, in awarding punishment for charges which are not offences in point of law, and for offences

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REG. of which the parties have not legally been found guilty; and therefore, when the question is put that it be reversed, I shall say, Content.

[*421] Notwithstanding some observations of my two noble and learned friends who first addressed you, leading to an entire abandonment of the judicial functions of this House, and a denial to the subject of the relief which the Constitution has provided in case of erroneous judgments in the Courts below, I need hardly *press upon your Lordships, that you are not bound by the opinion of the majority of the Judges whom you thought fit to consult, although the opinion is entitled to the highest possible respect. The appeal is not from the Irish Judges to the English Judges, but to this Chamber of the Imperial Parliament, which I hope will long continue satisfactorily to administer justice in the last resort to all the inhabitants of the United Kingdom.

The LORD CHANCELLOR, from his place on the woolsack, put the question, “Is it your Lordships’ opinion that the judgment of the Court below in this case be reversed? As many of your Lordships as are of that opinion, will say ‘Content.’”

Lords COTTENHAM, CAMPBELL, and DENMAN, answered “Content.”

THE LORD CHANCELLOR:

As many as are of an opposite opinion, will say “Not content.”

Lord BROUGHAM and one or two other Peers said “Not content.”

The LORD CHANCELLOR made no declaration of what he considered to be the opinion of their Lordships. After a pause of some moments, the noble and learned Lord again put the question in the same terms, and with the same result.

LORD WHARNCLIFFE (who, according to usage in such cases, addressed the House from his seat) said:

[*422] My Lords, in this state of things I cannot help suggesting that your Lordships should not divide the House upon a question of this kind, when the opinions of the law Lords have been already given upon it, and the majority is in favour of reversing the judgment. In *point of fact, my Lords, they constitute the Court of Appeal; and if, departing from what the practice has ever been, noble Lords unlearned in the law should interfere to decide such

questions by their votes, instead of leaving them to the decision of the law Lords, I very much fear that the authority of this House as a court of justice would be very greatly lessened throughout the country. Under these circumstances, and with these views, I beg leave, humbly to suggest, that such of your Lordships as are not Lords learned in the law, and have not heard the whole case, and cannot be supposed to be acquainted with the whole of the reasoning upon it, and who are therefore not qualified to pass a judgment upon such an occasion, should abstain altogether from voting. It is far better that the character of this House as a court of appeal and a court of law should be maintained, even though the decision should, in the opinion of your Lordships, be objectionable, as being contrary to that of the Judges, and although it should prove inconvenient in this particular instance; it is, I say, under such circumstances, better to concur in the opinion of the majority of the law Lords, than reverse the judgment of those persons who by their education and station must be best able to decide upon subjects of this nature, and who in reality constitute the court of law in this House.

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LORD BROUGHAM:

I perfectly agree in the opinions expressed by my noble friend. Differing, as I do, in opinion from the majority of the law Lords, and concurring in opinion with the majority of the learned Judges, both in Ireland and here, on the subject of this judgment, while I deeply lament the decision which has just been come to, considering, as I do, that it will have a *tendency to, I was going to say, shake confidence in this House; but without saying that, deeply lamenting the decision which has now been come to, and which I cannot go along with, because I think it is a decision which will go forth without authority, and come back without respect; nevertheless, I highly approve of the view of this matter taken by my noble friend, and implore your Lordships who have not heard all the arguments, who have not made yourselves perfectly acquainted with the subject, and whose habits do not lead you to take part usually in the discussion of such questions, not to take any part in the decision. In justice to myself, and with reference to a subject which has been alluded to to-day, I beg to say, that when, on a former occasion, I differed from the learned Judges on the subject of the Irish marriages, I did so in a case which did not at all resemble this case; and I differed from them on that occasion

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because they differed in opinion from the eminent and venerable authority of Lord STOWELL, and other learned persons well capable of forming a correct opinion upon the subject, and whose decisions carry with them the greatest weight and authority. If it had not been for that, I should on no account have set up my judgment against that of the learned Judges.

LORD CAMPBELL :

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I concurred with my noble and learned friend in opposing the unanimous opinion of all the Judges, in the case of the Irish marriages. I opposed their opinion then because I thought it was contrary to the law of England ; and I now oppose the opinion of a majority of the Judges, only because I hold that opinion to be equally contrary to the law of England. With reference to the distinction between law Lords and lay Lords, and to what has been said as *to leaving the decision of this case with the law Lords, it is unnecessary for me to say more than that such a distinction is one which is not known to the Constitution : but, nevertheless, I think that no Judge ought ever to decide a case, all the arguments in which he has not heard, and of which he can therefore know comparatively nothing. I believe that none but the law Lords have attended to the arguments in this case : it would therefore, I think, be proper that noble Lords who have not heard the case should abstain from voting.

THE LORD CHANCELLOR :

I think those noble Lords, who have not heard the arguments, will decline voting if I put the question again.

The Earl of STRADBROKE said that he had considered the subject most attentively, and he was desirous of giving an opinion with respect to it.

THE MARQUESS OF CLANRICARDE :

My Lords, I think it right to say, that if any noble Lord, not learned in the law, who has not heard the whole argument, votes in addition to the law Lords on this question, I shall, as a matter of privilege, think it my duty also to give my vote. In stating that intention, I must also say that I should be very sorry to be reduced to that necessity ; for I should look upon the course of proceeding which would oblige me so to act, to be one of the most calamitous nature to this House and the country ; but I must add, that it is

not required in this case, more than in any other, that the particular Lords who vote should be those who have studied questions of this kind. I think it infinitely better that all those noble Lords who are not, in the common acceptation of the term and in the usage of Parliament, qualified to decide, should leave the House; and I hope that I shall be allowed to do so, in common with all other noble Lords who are not lawyers.

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THE EARL OF VERULAM:

I agree with the noble Lord who has just addressed your Lordships; and therefore, with the permission of your Lordships, I will retire.

All the lay Lords then withdrew (1).

The question that the judgment be reversed was again put, when it was carried in the affirmative.

Judgment of the Court below reversed.

(1) In the following cases, the Lords who were not members of the legal profession took part in the decision:

Reeve v. Long, Lords' Journals, A.D. 1695; vol. 15, p. 446.—Reported in 1 Salk. 227, where it is said that the judgment was reversed, against the opinion of all the Judges.

Bertie v. Falkland, Lords' Journals, A.D. 1697; vol. 16, pp. 230, 240.—There are several entries relating to this case, the result of which is thus summed up in Colles' Reports, pp. 10—13, in extracts from the Journals: On hearing counsel on both sides, the debate was adjourned, and all the Lords this day present were to be summoned, and all the Judges also. After hearing counsel again, the question was proposed, whether the appellant shall have any relief in this case, and it was resolved in the affirmative, against which there was a protest of twenty-one dissentient Peers; on which there was another day appointed for considering the case, and there was a division, and thirteen Peers dissented from the resolution.

Ashby v. White, Lords' Journals, A.D. 1703; vol. 17, p. 369.—The

judgment of the Court of Queen's Bench was reversed; but four Bishops and nine lay Lords declared their dissent from the reversal. This case, though within the period of Colles' Reports, is not printed by him. The case is reported in the Queen's Bench, 2 Ld. Ray. 938; 6 Mod. 45; 1 Salk. 19; and in Parliament, 1 Br. P. O. 62. In the report in Lord Raymond, where the final result is mentioned, it is said that Chief Justice TREVOR, and Baron PRICE, were of opinion with the three Judges of the Queen's Bench; and that Chief Baron WOOD, and Barons BERRY and SMITH, agreed with Lord HOLT; that TRACY doubted; and NEVILLE and BLENCOWE were absent. In Salkeld the first part of the statement is the same; but the reporter then adds generally, that "the rest of the Judges" agreed with Lord HOLT. Both reporters represent that sixteen Lords (which is erroneous) agreed with the three Judges of the Queen's Bench, and fifty voted in favour of the opinion expressed *by Lord Chief Justice HOLT. The report in Brown's Parliamentary Cases says nothing of the opinions of the Judges, nor of the majority of the Lords, but records the names of the thirteen

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1844.

July 1.
Sept. 2.

SAMUEL GRAY v. REG. (1).

(11 Clark & Finnelly, 427—490; S. C. 8 Jur. 879.)

Lord
LYNDHURST,
L.C.

The right of a defendant to a peremptory challenge of jurors to the number of 20, exists in all cases of felony, and is not confined to those which are punishable capitally.

Lord
BROUGHAM.

The law is, in this respect, the same in Ireland as in England.

Lord
CAMPBELL.
TINDAL,
Ch. J.

An indictment was preferred in 1842, at Monaghan, in Ireland, against Samuel Gray, framed upon the statute 1 Vict. c. 85 (2);

WIGHTMAN,
J.

COLTMAN, J.

WILLIAMS, J.

PATTESON, J.

POLLOCK,
C.B.

GURNEY, B.

PARKE, B.

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dissentient Lords, as they are stated on the Journals: namely, the Bishops of LONDON, ROCHESTER, CHESTER, and ST. ASAPH; and Lords ROCHESTER, NORTHAMPTON, SCARSDALE, WEYMOUTH, GRANVILLE, GOWER, ABINGDON, GUERNSEY, and GUILDFORD.

Douglas v. Hamilton (known as the *Douglas* cause), Lords' Journals, A.D. 1769; vol. 32, p. 264.—Lords CAMDEN (Lord Chancellor) and MANSFIELD (Chief Justice of K. B.) advised a reversal of the judgment of the Court below, and the motion was carried; but the Duke of BEDFORD, and Lords BRISTOL, C.P.S., SANDWICH, DUNMORE, and MILTON, entered a protest against the decision. The speeches of Lords CAMDEN and MANSFIELD are printed in the *Collectanea Juridica*, vol. 2, p. 405.

Alexander v. Montgomery, Lords' Journals, A.D. 1773; vol. 33, p. 519.—On the question whether the interlocutors complained of should be reversed, the votes were equal, 4 and 4; when the ancient rule of law, *semper præsumitur pro negante*, applied, and the judgment was affirmed.

Hill v. St. John, Lords' Journals, A.D. 1775; vol. 34, p. 443.—The judgment of the Court of Common Pleas had been reversed in the Court of King's Bench. The Barons of the Exchequer were summoned to attend the Lords, and Lord Chief Baron SMYTHE concurred with the Court of King's Bench, and Barons BURLAND and EYRE with the Court of Common Pleas; "which latter opinion was also strongly sup-

ported in argument," says Sir W. Blackstone, "by Lord APSLEY (Lord Chancellor), and Lord CAMDEN, the only law Lords in the House." But the motion to affirm the judgment of the King's Bench was carried without a division. See 2 Sir W. Bl. Rep. 930. and 3 Br. P. C. 375.

The Bishop of London v. Ffytche. Lords' Journals, A.D. 1783; vol. 36, p. 687.—The judgment of the Court of Common Pleas had been given for the plaintiff; that judgment was affirmed in the King's Bench. Seven Judges gave opinions in favour of the judgment of the Court below. One was for reversing it. Lord THURLOW, and the Bishops of SALISBURY, BANGOR, LLANDAFF, and GLOUCESTER, were for reversing the judgment. Lord MANSFIELD (Lord Chief Justice), and the Duke of RICHMOND, for affirming it. The judgment was reversed. The Journals do not state the numbers on the division; but in the report 2 Br. P. C. 211, and in Cunningham's Law of Simony, p. 52, where the speeches are fully given, and also in 1 East, 487, it is said that the reversal was carried by 19—18.

(1) *Leringer v. Reg.* (1870) L. R. 3 P. C. 282, 289, 39 L. J. P. C. 49, 23 L. T. 362.

(2) By which it is enacted (s. 3), "That whosoever shall shoot at any person, or shall by drawing a trigger or in any other manner attempt to discharge any kind of loaded arms at any person, with intent to commit the crime of murder, shall, although no bodily injury shall be effected, be guilty of felony," and be liable to

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and it charged the defendant, in the first count, with feloniously, unlawfully, and maliciously shooting at one James Cunningham, with intent to murder him; and, in the second count, with feloniously, unlawfully, and maliciously shooting at James Cunningham, with intent to do him grievous bodily harm. Gray pleaded Not guilty. On this indictment he was tried, at the Monaghan Lent Assizes, 1842; and in consequence of the illness of one of the jurors, the jury was discharged from giving a verdict. He was again tried at the Summer Assizes, 1842, and the Lent Assizes, 1843; and on each occasion the jurors disagreed about their verdict, and were discharged. The indictment was then removed by *the Crown into the Court of Queen's Bench, at Dublin, by writ of *certiorari*; and in Easter Term, in the year 1843, Gray being called upon to plead to the indictment, pleaded specially *autrefois acquit*, stating, in substance, that he had been already tried for, and acquitted of the murder of one Owen Murphy, and that the murder of Owen Murphy was the same identical transaction as the felonious shooting of James Cunningham, now charged against him; and that the murder of Owen Murphy and the felonious shooting at Cunningham, were one and the same felony, and together formed and constituted one entire felonious transaction; and that consequently the jury could not have acquitted Samuel Gray upon the charge of the murder of Owen Murphy, without also acquitting him, by necessary implication, upon the charge of feloniously shooting at James Cunningham. This plea was demurred to upon the part of the Crown, and Gray joined in demurrer. In Trinity Term, 1843, the Court of Queen's Bench decided that this plea was not sufficient in law, and gave judgment of *respondeat ouster* against Gray accordingly (1); and thereupon he pleaded Not guilty. The record was sent down for trial to the Summer Assizes for the aforesaid county of Monaghan, in the year 1843. Upon the trial Gray challenged, as they were called into the box, and before they were sworn, two of the jurors, William Charles Waddell and James Kelly, peremptorily, and without showing any special cause or ground of challenge. These challenges were demurred to respectively on the part of the Crown, and such demurrers were allowed by the Court, and the challenges

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transportation. Sect. 4 is similar in its provisions, except that the intent there provided against is, the "intent to maim, disfigure or disable, or to do some other grievous bodily harm."

The punishment is the same in this as in the preceding section [rep. 24 & 25 Vict. c. 95, s. 1].

(1) 5 Brady, M'Causland, Jones & M. 524.

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overruled (1) : and the indictment was *tried accordingly by the said W. C. Waddell and J. Kelly, and 10 other jurors, who returned a verdict of Guilty. In the Hilary Term following Gray moved to arrest the judgment of the Court of Queen's Bench, upon the ground that his above-mentioned challenges had been disallowed contrary to law. This motion was (Mr. Justice PERRIN, *diss.*) refused by the Court (2), and judgment of transportation for life was given against him. The present writ of error had been brought to reverse this judgment of the Court of Queen's Bench in Ireland.

The Judges were summoned; and Lord Chief Justice Tindal, Lord Chief Baron Pollock, Justices Patteson, Williams, Coleridge, Coltman, and Wightman, and Barons Parke and Gurney, attended.

Mr. Napier and Mr. Dawson, for the plaintiff in error :

This is the case of an indictment founded on the 1 Vict. c. 85, ss. 3 and 4 ; and the question is, whether upon an indictment under that statute, the prisoner has a right to a peremptory challenge of the jurors. The negative of this question will be contended for on the other side, upon the ground that the life of the party is not in danger : but it is submitted on the part of the plaintiff in error, that a right to peremptory challenge is incident to a felony of every kind, whether at common law or by statute ; for that the simple creation of a felony by statute gives it all the incidents which attend any existing felony. * * *

[439] *The Attorney-General for Ireland (Mr. T. B. C. Smith), and Mr. Waddington*, for the Crown :

The judgment of the Court below must be affirmed. The English practice is not warranted by law ; the Irish practice is in accordance with all the authorities. The 10 & 11 Cha. I. c. 9, was not a statute creating a right in favour of the subject, but limiting the right which he already enjoyed at common law. * * *

[445] Lord CAMPBELL, in the absence of the Lord Chancellor, proposed for the consideration of the Judges the following question, which

(1) Irish Circ. Rep. 420. The demurrer depended on the construction of the 9 Geo. IV. c. 54, s. 9 ; by which it is provided that "no person arraigned for treason or murder, or for other felony, shall be admitted to any peremptory challenge above the

number of 20." This stat. had repealed (among a great many others) the 10 & 11 Car. I. c. 9 (Ir.), which had contained a proviso in the same terms.

(2) Joy on Peremptory Challenge of Jurors, Append. i.

had been prepared by the LORD CHANCELLOR before his Lordship left the House :

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“A. B. being indicted under the statute 1 Vict. c. 85, s. 3, for the commission of the felony of shooting at another person with intent to murder, challenged peremptorily one of the jurors called to be sworn upon the trial: it was objected to by the prosecutor. Ought the Court to have allowed or disallowed such challenge?”

The Judges requested and were allowed time to consider the question.

The Judges attended this day; and, differing in their answers, they delivered their opinions *seriatim*.

Sept. 2.

WIGHTMAN, J. :

The offence in question is a felony, but the punishment is not capital; and it is to be considered whether the privilege of peremptory challenge depends upon the quality of the offence, or the punishment.

It has been so invariably the practice in all the Courts of criminal judicature in England, to allow a prisoner, charged with any felony whatever, whether capital or otherwise, to challenge peremptorily any of the jurors called to be sworn, to the number of 20, that the first impression upon the mind of any one accustomed to practice in those Courts would be, that *unless it clearly appeared that such practice was founded on error, its existence so long, without dispute or controversy, raises a strong presumption that its origin was legal and its continuance of right, and that the privilege is attached to the quality of the offence, and not to the punishment. It is said, however, that it is a privilege allowed only *in favorem vite*, and does not extend to cases in which the punishment is not capital. This position appears to be founded upon an observation made by some of the text-writers, as to the ground upon which a peremptory challenge is allowed to persons charged with treason or felony, that it is *in favorem vite*.

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It is hardly necessary for the purpose of the present question to inquire critically into the etymology or original meaning of the term felony, but it is said by Sir William Blackstone (1) that the distinctive incident in felony is forfeiture, and not capital punishment; and that at common law there are offences which are felonies though not capital, and that there are offences, the punishment of

(1) 4 Comm. p. 97.

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which is capital though they are not felonies. He gives instances of these, to which it is not necessary to refer; but he further remarks, that “the idea of felony is so generally connected with that of capital punishment, that we find it hard to separate them, and to this usage the interpretations of the law do now conform; and therefore if a statute makes any new offence felony, the law implies that it shall be punished with death, as well as with forfeiture.” This passage tends to explain how it would happen that the privilege of peremptory challenge allowed in felony should be considered as originating *in favorem vitæ*; and accordingly we find in books of the highest authority, that the privilege is stated to be incident to felony generally; and the *reason assigned by some is, that such a privilege is *in favorem vitæ*.

It is said by Mr. Justice Foster, in his Discourse on Homicide (1), that “at common law all felonies, except petty larceny, rape, and mayhem, were capital offences, unless in cases where the offender was capable of holy orders, and qualified for them;” and it may very well be that, felony generally being capital, the privilege was allowed generally to cases of felony, because the great majority were capital, though there were some few that were not.

In Finch’s Law of Trial by Jury (2), it is said, “in indictments and appeals of felony, the defendant may challenge 35 jurors without showing cause; which is called a peremptory challenge.”

In Doctor and Student, it is said (3) that, “he that is arraigned upon an indictment of felony, shall be admitted, in favour of life, to challenge 35 jurors peremptorily.”

Lord Coke (4), speaking of peremptory challenge, says, “This is so called, because he may challenge peremptorily upon his own dislike, without showing of any cause; and this only is in case of treason or felony, *in favorem vitæ*: and by the common law, the prisoner, on an indictment or appeal, might challenge 35, which was under the number of three juries.”

In Comyns’ Digest (5) it is said, “So in petit treason or felony, by the common law he might challenge 35.”

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Each of the four eminent authorities I have cited, states the privilege of peremptory challenge as applicable to all cases of felony, without making any exception, *though the reason added by two of them does not apply to three or four of the common-law felonies.

(1) Foster’s C. L. 305.

(2) Bk. 4, c. 36, p. 414.

(3) P. 29.

(4) 1 Inst. 156 b.

(5) Tit. Challenge, C.

If the privilege did not extend to all felonies, it seems strange that no exception should be made by them.

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The opinion that the privilege was incident to the quality of the offence, and not to the punishment, though the severity of the latter as generally applicable to the offence may have been the first cause of it, is supported by the fact of the privilege having always been exercised in cases where benefit of clergy might be claimed, and the felony was virtually and practically no longer capital. It may indeed be said, that down to the statute 5 Anne, c. 6, the prisoner might not always be qualified to receive the benefit of clergy, as he might not be able to read; but by that statute, the necessity of reading to entitle a prisoner to the benefit of clergy was done away with, and any person from that time was entitled to the benefit of clergy in all clergyable felonies, merely for asking for it; and from that time those felonies practically and virtually were no longer capital; but the parties charged were still allowed their challenges as in other cases of felony, though there was no longer any danger of their lives in case of conviction.

Several statutes have at various times been passed apparently recognizing the privilege as incident to felony generally, and without reference to the punishment upon conviction. By the statute 22 Hen. VIII. c. 14 (1), it was enacted, that "no person arraigned for any petit treason, murder, or felony," should be admitted to any peremptory challenge above the number of 20. By the Irish statute 10 & 11 Car. I. c. 9, s. 1, it was enacted, "that no person arraigned for any offence of high treason, petty treason, murder, manslaughter, or of any other felony whatsoever, shall be admitted to *challenge peremptorily above the number of twenty." The 6 Geo. IV. c. 50, s. 29, is to the same effect, that "no person arraigned for murder or felony, shall be admitted to any peremptory challenge above the number of twenty." And the statute 9 Geo. IV. c. 54, s. 9, contains a similar enactment for Ireland, and nearly in the same terms.

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Upon the whole, it would seem that the origin of the privilege in felony may have been the capital punishment usually incident to that quality of crime, but that the privilege was annexed to the quality of crime called felony, and continued so annexed in practice, in England at least, down to the time when the present question was raised, in all cases of felony, whether the punishment was capital or not; and that it has been recognized as incident to felony generally, by the statutes to which I have referred.

(1) Rep. S. L. R. Act, 1863.

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I am therefore of opinion, that the Court ought to have allowed the challenge.

COLTMAN, J.:

[*450] It appears to me, on the best consideration which I can give to this very intricate and difficult question, that, by the common law of England, the right of peremptory challenge was given in all felonies except in the case of petty larceny, and that the reason why it was allowed was because the party's life was in jeopardy; but that there is no sufficient ground for saying that the right was given conditionally only, and to continue only so long as felony should continue to be a capital offence. There is no decision of any court of law in England, that the existence of the right is so limited. There is, indeed, a *dictum* of Lord Ch. J. NORTH, in *Reading's* case (1), which is supposed to *go to this extent. The indictment was for a misdemeanor, and the CHIEF JUSTICE is reported to have said, "You cannot challenge peremptorily in this case, it not being for your life." Now, as far as the overruling of the challenge was concerned, this was a decision, and one that is quite unobjectionable: what is added seems to have been said, perhaps unnecessarily, by way of justifying the law from any imputation of hardship in disallowing peremptory challenges in misdemeanors, and not by way of laying down any general rule as to the cases in which peremptory challenges ought or ought not to be admitted. Even if this *dictum* had been stronger than it is, it would hardly be of more weight than what was said of an opposite nature by Chief Justice PARKER, in the case of *Rex v. Macartney* (2), which was an indictment for murder, where, on a motion for a special jury, he said that there cannot be a special jury in treason or felony, for the party must have the advantage of challenging twenty without cause shown. This case is the more deserving of attention, inasmuch as a special jury is never granted in criminal cases, except for misdemeanors only (3).

If we turn to the text-writers of the greatest weight, we find them stating, in general, that the privilege was granted in favour of life. Lord COKE (4), in speaking of peremptory challenges, says, "Peremptorie: This is so called because he may challenge peremptorily, upon his own dislike, without showing of any cause; and this only is in case of treason or felony, *in favorem vite*." Now it cannot, I

(1) 7 How. St. Tr. 264.

(2) Vin. Abr. tit. Trial, D. a. 2, pl. 5.

(3) 1 Chitty C. L. 522.

(4) 1 Inst. 156 b.

think, be inferred that, because the right was *granted in *favorem vite*, it must necessarily cease when the life ceased to be in jeopardy. It must, however, be observed, that some of the text-writers go further, and confine the right of peremptory challenge, in express terms, to capital cases: for instance, in the book called "Trials per Pais," c. 16, it is said that a peremptory challenge is not allowable but when the life of man comes in question. So in Wood's Institutes (1) it is said, "A peremptory challenge is not allowable but in case of life or death;" for which he quotes the above-cited passage from Co. Litt. which can hardly be said to go to the extent for which he cites it. There are other writers who lay the rule down without qualification. Finch (2) says, "In indictments and appeals of felony, the defendant may challenge thirty-five jurors;" and in Comyns' Digest (title Challenge) it is said, "In petit treason or felony, by the common law the prisoner might challenge thirty-five; which is now restrained by the statute 22 Hen. VIII., to twenty."

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That the doctrine laid down by some of these authorities, namely, that a peremptory challenge is never allowed except when life is at stake, cannot be true, appears to me to be proved by the circumstance of a peremptory challenge being allowed in misprision of treason down to the time of the 33rd of Hen. VIII. By the statute 33 Hen. VIII. c. 23, s. 3, it was enacted that peremptory challenge should not from thenceforth be allowed in any case of high treason or misprision of treason. Now, it seems to me to follow necessarily from this enactment, that a peremptory challenge was allowed in indictments for that offence; the punishment of which, though extremely severe, was not capital.

It has been suggested that, at one time, misprision of treason was a capital offence; for it is said that Bracton considers concealment of treason as being treason; and Lord Coke says (3) that, by the common law, concealment of treason was treason, as it appears by *Lord Scrope's* case. But the meaning of this is, I conceive, that an indictment for treason might be supported by a proof of concealment of treason, and in that case the ordinary sentence for treason would be passed; but if the milder course were adopted, of indicting for a misprision, in such case the sentence was not capital: and this view derives support from the statute 1 & 2 Phil. & M. c. 10, s. 8, by which it is declared and enacted, "that concealment or keeping secret of any high treason, be deemed and taken only misprision of

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(1) P. 462.

(3) 3 Inst. 36.

(2) Bk. 4, p. 414.

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treason, and the offenders therein to forfeit and suffer as in cases of misprision of treason hath heretofore been used." These latter words evidently point to an ancient recognized mode of dealing with the offence of misprision of treason as distinct from treason, and which must have been then, as now, a misdemeanor.

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As, however, the question I am considering arises upon very ancient matters of a technical nature, in which every step is liable to mistake, I should have little confidence in any opinion that might be formed if it were at variance with modern practice; and here we are met with the startling fact, that the practice of the Courts of law in England, and that of the Courts of law in Ireland, are in direct opposition to each other; and I should have attributed the greatest weight to the Irish practice, if I did not find it to be at variance, as I conceive, with a principle of law which is firmly established. The practice *of the Irish Courts, I understand to have been, not to allow peremptory challenges in the case of clergyable felonies. This practice I conceive to have been erroneous, as the clergy might be counterpleaded, and the party executed, so that the charge ought to be considered as a capital charge. I am driven, then, to resort to the English practice, and I do not conceive that, with respect to that, any difference of opinion can arise. I believe it has always been the practice in this country, in all felonies above the degree of petty larceny, to allow peremptory challenges as a matter of right.

On these grounds my humble opinion is, that your Lordships' question should be answered in the affirmative: and I have the less reluctance in coming to this conclusion, because I think it clear that the Act of Parliament was not intended to abridge any right that prisoners possessed before it passed; and as the right of peremptory challenge is little less important now than when all felonies were capital, it ought, in justice to prisoners, to be preserved to them.

WILLIAMS, J. :

In reply to the question proposed by your Lordships, I beg leave to give the same answer as my learned brethren who have preceded me.

In the first place, I believe it is admitted on all hands, that the prevalent usage (in this country, at least, and I know not whether your Lordships will notice any other) has been to allow a peremptory challenge, up to the prescribed number, in all cases of felony. Whether petty larceny be included (about which there may be some difference of opinion), as it does not seem to affect this question, it

is not necessary to stop to inquire. No instance has been, and it is *believed that none can be, adduced wherein a distinction has been taken between felonies that are capital, and those which are not. What degree of weight is due to this constant and undeviating course of practice, it is for your Lordships to decide; to my apprehension, it is an ingredient in the case of very considerable importance. To attribute this prevalence to connivance or concession, or to anything but right, seems to me a solution of a very unsatisfactory description. Why should an unauthorized indulgence, not founded upon any warrant or principle of law, have been conceded, if it could have been resisted, in this case in particular above all others? I should rather think it probable, that as a peremptory challenge may be for any reason wholly unknown, and therefore to a certain extent of a personal and offensive nature, it would have been resisted if resistance had been considered practicable. Without pressing this observation to an excessive and extravagant extent, or going so far as Lord Ch. J. WILMOT, who, in his judgment in *Wilkes's* case (1), does not hesitate to declare that “a course of precedents and judicial proceedings make the law,”—it does, at least, constitute a presumptive case, which it is incumbent upon the party impugning it to do so upon clear and satisfactory grounds, before a departure is made from such a body of ancient and modern experience. That, therefore, is cast upon those who maintain that the challenge of the prisoner in this case was properly disallowed.

But to enter further into the case: The adverse argument appears to me mainly to rest upon the authority of text-writers (of great name and weight, undoubtedly), who so generally give as a reason *for allowing the peremptory challenge, that it is *in favorem vite*; from which it is of course inferred that, except where life is at stake, such challenge may not be allowed: because if it should be found that the expression *in favorem vite* is equivalent to and really means no more than that such challenge is allowable in treason and felony, and that, at the time when it was first used, it applied just as much to felony generally as to treason, and that the phrase has since been continued to express the principle upon which such challenges are allowable, I must confess that the prevalent usage, with the legislative exposition, to which I shall presently refer, and upon which I very much found myself, does constitute a case which (but for the respect I have for the contrary opinion), I should have thought, admits of no doubt whatever.

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(1) Wilmot's Judg. & Opin. 330.

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The use of the expression *in favorem vite* may perhaps be as well considered in the passage of Lord Coke where he treats of peremptory challenge (1), as in any other; partly because that passage is directly referred to by Hawkins (2), and partly because Lord Coke refers to Staundforde, Fortescue, and all the earlier authorities. Now, first it is observable that Lord Coke, though he speaks of *in favorem vite* as the reason for allowing the challenge, yet mentions felony generally of all kinds, treason only being named particularly. Hawkins, in the passage referred to, uses this language: "I take it to be agreed, that a peremptory challenge was allowable by the common law, in all capital cases, both upon indictments and appeals, and also in misprision of high treason." Hawkins, then, did not mean to lay down the general proposition that such challenge was allowed *in favorem vite*, or capital cases only; for he includes misprision of treason, which was not capital, and yet challenge, to a stipulated number, according to him, was allowed.

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In Lord Hale's Pleas of the Crown (3), he does not refer to Lord Coke, or any of the ancient authorities before mentioned, but to Moore, 12, to warrant him in saying that the right of peremptory challenge, to any number under three whole juries, was *in favorem vite*; and in the case referred to there is nothing to warrant such conclusion; from which I infer that Lord Hale does not use the expression as if any peculiar weight or importance was attributable to it, but rather illustrating the principle upon which the challenge is allowed, indulgence to the prisoner, though circumstances might have been changed since the first adoption of it.

I shall lastly refer to Blackstone's Commentaries (4), merely for the purpose of showing in what manner the subject is treated by one writer after another. "In criminal cases (he says), or at least in capital ones, there is, *in favorem vite*, allowed to the prisoner an arbitrary and capricious species of challenge to a certain number of jurors, without showing any cause at all." He then breaks out, as his manner is, into an eulogy upon the humanity of the English law, which will not allow a man to be tried by another whose countenance is not agreeable. It is obvious, however, that if this reason be good for anything in a capital case, it must prevail, to a certain extent, in inferior cases; it is a question of degree only, of more or less.

It is now proper to advert to the state of the law at the time when

(1) 1 Inst. 156.

(2) Bk. 2, c. 43.

(3) Vol. 2, p. 267.

(4) Vol. 4, p. 353.

the expression *in favorem vite* first had *its origin, and from which it has been continued, from one writer to another, so late as the author last quoted. And it cannot be denied that all felonies (I purposely exclude petty larceny, for the reason already mentioned) were capital. To say, therefore, at that early time, that a peremptory challenge was allowed *in favorem vite*, and to say that it was allowed in felony generally, were expressions of precisely the same meaning. If it was a charge of felony, life was in question, and the allowance of challenge in such case was, strictly, *in favorem vite*; but to infer that, because capital punishment in the case of any particular felony may have been taken away, and the challenge can therefore be no longer said to be *in favorem vite*, the right of challenge is for that reason lost, is contrary, as I think, to all sound reasoning, upon any legal principle or authority; and yet that is what ought to be shown, to maintain the judgment below.

I come now to the consideration of some statutes which seem to me to have an important bearing upon this question. The first is the 22 Hen. VIII. c. 14, the 6th section of which is in the following terms: "And that no person arraigned for any petit treason, murder, or felony, be from henceforth admitted to any peremptory challenge above the number of twenty." Now it is to be observed, that this is no incidental allusion to the subject, in a statute having other and different objects, but an express provision respecting this very subject of challenge, and making an important alteration therein. And as the language is "treason, murder, or felony," I cannot but consider this as a legislative recognition that in felony generally, without reference to capital or not, a peremptory challenge had been allowed before, and continued to be so, subject to the restriction as to 20. The next statute is *the 38 Hen. VIII. c. 23, s. 4, by which it is enacted, "that peremptory challenge shall not from henceforth be admitted or allowed in any cases of high treason, nor misprision of high treason." This therefore plainly shows, as was noticed in the passage cited from Hawkins, that in a case, not a capital felony, nor even a felony at all, peremptory challenge was allowable. And, accordingly, the generality of the rule as to *in favorem vite* is clearly broken in upon, and its soundness thereby impeached. Lastly, as to the statute 7 & 8 Geo. IV. c. 28, s. 3, which provides "that if any person indicted for any treason, felony, or piracy, shall challenge peremptorily" more than the number allowed by law, every such challenge shall be "entirely void." Then comes section 6, whereby "benefit of clergy with

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respect to persons convicted of felony shall be abolished." I shall not repeat the observations already made upon the statute of Hen. VIII., but merely observe that they seem to be precisely applicable to the 3rd section of the latter Act. If it be contended that the question is impliedly affected by the 6th section, I confess my inability to do justice to that argument, and I must therefore pass it by, with the remark, that the direct influence which I draw from the latter statute, taken altogether, is in favour of the right of challenge which was disallowed, and, upon the whole, I think improperly.

GURNEY, B. :

I concur in opinion with the learned Judges who have preceded me, that the Court ought to have allowed the challenge in question.

[*459] There appears to have always existed a right of peremptory challenge in cases of felony ; and undoubtedly it is stated by every writer on criminal law, one repeating the language of the other. that it was in **favorem vite*. I think that there may be some question whether that was the ground upon which it was originally allowed, or whether it was a reason found out after it had been established. The ancient practice was to allow this to the extent of 35, one short of three full juries ; but by statute 22 Hen. VIII. c. 14, it was enacted, that no person arraigned for murder or felony should be admitted to any peremptory challenge above the number of 20. I think the plain and necessary inference from that is, that in every case of felony a right to a peremptory challenge to the extent of 20 exists. And whatever the felony may have been, from that time there is no case in which the right to challenge peremptorily to that extent has not been allowed ; and whatever alterations might be made respecting felony by subsequent statutes, unless this provision be altered, the right to challenge 20 must have continued to subsist.

But it is contended that, as at common law felony was punishable by death, and the relaxation of that has been by means of benefit of clergy, the right to challenge must necessarily be considered as limited to cases in which (unless clergy be pleaded) the punishment extends to death. I think that it is too much to say that that construction should be allowed to prevail ; considering, first, the very partial, afterwards the more extended, and finally, the general application of benefit of clergy. In all cases where benefit of clergy was not excluded, the person accused really was not in peril of his

life ; and whenever the peril of life ceased, and the challenge was allowed to continue, that was a practical condemnation of the doctrine that the challenge was allowed only *in favorem vite*. The reason no longer applied, yet the practice of challenge existed.

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During the whole of a long professional life I have *witnessed the constant exercise of the right of challenge in all felonies, and no distinction ever made as to whether they were clergyable or not clergyable. Whether felonies at common law or felonies created by statute, if there was any legal proposition which was considered as undoubted by every professional man practising in Courts of criminal justice, it was, that every person accused of felony had the right of peremptory challenge to the number of twenty. It is very extraordinary that a contrary practice should have existed in Ireland, as we find that it has done, and that the difference of the practice has not attracted earlier attention.

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It was not till the 7 & 8 Geo. IV. that benefit of clergy was abolished in England; and by the 9 Geo. IV. c. 54, that it was abolished in Ireland. But long before those statutes passed many felonies had been created by statute, some of which limited the punishment to transportation for seven years, and others to transportation for fourteen. There are expressions used by very learned Judges, that inasmuch as those offences were made felonies, the persons, if convicted, must pray benefit of clergy; but these *dicta* were foreign to the point upon which the Judges were called to decide; and I own that I cannot bring myself to think, where the punishment was limited to transportation, that under any circumstances judgment of death could have been pronounced. But if any doubt could exist before the statutes abolishing benefit of clergy, it does appear to me that after the Acts of Parliament which abolished it both in England and in Ireland, and made provision as to challenges, all difficulty is removed. The statute 7 & 8 Geo. IV. c. 28, s. 6, abolished benefit of clergy in England; the statute 9 Geo. IV. c. 54, abolished it in *Ireland; from that moment, therefore, all distinction between clergyable and non-clergyable felonies was gone. That statute then enacts that certain acts should be felonies, and should subject the parties committing them to certain punishments short of death; and it then goes on to enact, that as to all felonies, if a person shall challenge more than twenty, the excessive challenges shall be rejected, the jurors so challenged beyond the twenty shall be sworn upon the inquest, and the trial proceed. If there be meaning in

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language, it follows that all persons who shall in future be arraigned for felony, whether felony then existing or felony thereafter created, shall have a right to challenge twenty.

The offence of which this prisoner is accused is an offence created by the statute of 1 Victoria. I think that it does not make any difference that it had been a felony before punishable by death: the statute which made it a felony, and so punished it, has been repealed; and this offence is a felony created by a statute which passed after the law which gave the person accused of felony the right of peremptory challenge; it found him clothed with that right, and he cannot be deprived of it.

PATTESON, J.:

The question proposed by your Lordships necessarily involves some inquiry into the origin of peremptory challenges of jurors, and the reason why they were allowed; yet I think at last that the answer will depend rather on a consideration of the meaning and effect of the statute 9 Geo. IV. c. 54, relating to Ireland, and having the same provisions as statute 7 & 8 Geo. IV. c. 28, s. 6, relating to England, than on anything else.

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At common law undoubtedly thirty-five peremptory *challenges were allowed to the prisoner, in cases of treason, murder, and felony. It is stated in books of authority that this was *in favorem vite*; it is so laid down in Staundforde (1) in express terms; also by Lord Hale, in his Pleas of the Crown (2), citing Moore, 12, in which case, however, nothing is said as to its being *in favorem vite*. Some doubt is made as to this matter in other books, but for the purpose of this argument it may be assumed that the allowance was *in favorem vite*.

Now at common law all felonies (whether including petty larceny or not is not material to the present purpose) were capital. The rule therefore as to challenges applied to all felonies. The extension of the privilege of clergy to all persons, whereby practically many felonies were rendered not capital, made no difference. It is said that the reason of this was, because it could not be told, until after a man was found guilty, whether he would pray the benefit of clergy, or if he did, whether it would be allowed, and therefore that all felonies continued capital at the time of arraignment. And this is true subsequent to the time of Hen. VI., but not before;

(1) Pleas of the Crown, Bk. ii., c. 43, p. 126 A. (2) Vol. 2, p. 268.

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for previous to that time the party pleaded that he was a clerk first, and that was tried before the charge of felony (1), and it was found inconvenient in several respects, one being, that thereby the party lost his challenges. This reason leads me to notice here, that peremptory challenges were always refused upon collateral issues; but that practice does not appear to me to affect the present question, because the reason was, not only that the life of the party was not involved in the collateral issue, but that the guilt or innocence of the *party was not involved; and therefore the challenges would be refused on such issue, whether they were granted on the issue of not guilty in *favorem vite*, or otherwise.

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It appears, therefore, that in England, until the statute 22 Hen. VIII. c. 14, and in Ireland until 10 & 11 Car. I. c. 9, the law was, that every prisoner in cases of treason, petit treason, murder, and felony (whether clergyable or not), had thirty-five peremptory challenges. The latter statute enacted, "that no person arraigned for high treason, petit treason, murder, manslaughter, or any other felony whatsoever, be admitted to challenge peremptorily above the number of twenty." The enactment in the English statute, 22 Hen. VIII. c. 14, was in nearly the same words, and by 33 Hen. VIII. c. 3, that enactment was made perpetual. In the same year the statute 33 Hen. VIII. c. 23, was passed, by which peremptory challenges were taken away in cases of treason and misprision of treason, which latter offence was never capital; and that circumstance furnishes another argument against the refusal of the challenges on the indictment supposed by your Lordships.

But to return to the statutes 22 Hen. VIII. c. 14, and 10 & 11 Car. I. c. 9, it appears to me that those statutes are legislative recognitions of the right of peremptory challenge in all cases of felony. I do not say that they gave the right *de novo*, nor extended it, but the Legislature must be supposed to have known the course of practice in the Courts; and if, as is not disputed, peremptory challenges were allowed at the time of the passing of those Acts in all felonies, whether clergyable or not, surely those statutes recognize such practice as law.

There is no doubt that the allowance of peremptory *challenges has been uniformly prevalent in all felonies until the 9 Geo. IV. c. 54 (Irish). Clergyable felonies were, during all that time, practically not capital, though indirectly, and yet peremptory challenges were allowed in them. Mr. Justice BURTON indeed

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states, in his judgment in this case, that they were refused ever since the year 1794, in all cases where capital punishment would not be involved, and that would carry the refusal back to a period before the abolition of benefit of clergy. But with all deference I think that learned Judge must be mistaken in his recollection for I cannot find any allusion to such a change in the practice anywhere else, nor can I see by what authority the Courts could have made the change, at any rate whilst felonies continued capital in theory, though not in practice. No instance can be found of any person being executed for a clergyable felony; none in which a person convicted of such felony had declined to pray the benefit of clergy, or been refused it. Then came the statute 9 Geo. IV. c. 54, which took away clergy, and enacted, that felonies should be punished according to the terms of the law respecting each, and none should be capital but those which were expressly so declared or excluded from benefit of clergy under the existing law. The very same statute, section 9, repeated the limitation of peremptory challenges to 20, enacting, "that no person arraigned for treason or murder, or for other felony, shall be admitted to any peremptory challenge above the number of 20." The words are "other felony," not "other capital felony;" and yet it is supposed that these words are to be so limited, the number of capital felonies having been most materially reduced at that time.

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The contention on the part of the Crown seems *therefore, to be, that as this statute (9 Geo. IV. c. 54) has taken away the punishment of death directly in cases where it was before taken away indirectly, but really with quite as much certainty and uniformity, so that the situation of a prisoner as to jeopardy of life is in no respect practically altered,—yet the statute is to be construed so as by implication, and by implication only, to deprive the prisoner of the valuable privilege of peremptory challenges, which had been enjoyed by prisoners really similarly situated for several hundred years. Such an implication ought surely to be strictly necessary; whereas here it is, in my opinion, not only not necessary, but in violation of the obvious intention, and even of the very words of the Legislature in the 9th section of the Act. If this implication is to prevail, it ought to extend to every other distinction which has been established *in favorem vitæ*, and the judgment of *respondeat ouster* upon the plea of abatement, which is found on this very record, is wrong, and ought to have been an absolute judgment of transportation; for the distinction, in this respect,

between felonies and misdemeanors had its origin just as much in *uocem vite* as peremptory challenges had.

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The language of 7 & 8 Geo. IV. c. 28, as to England, is nearly the same as that of 9 Geo. IV. c. 54, and since that statute prisoners have been allowed to challenge peremptorily in cases of felony not capital, as before; but as the point has never been discussed, I lay no great stress on that practice. The practice in Ireland appears to have been different, and there are decisions of very eminent Judges against the allowing such challenges, before the present case arose. Those decisions are entitled to great consideration, and should not lightly be overruled; but I do not feel them *to be of so stringent a force as to prevent me from freely inquiring into the soundness of them, in answering the question proposed by your Lordships: especially as the same common law is in force in both countries, and the statutes which have been passed *in pari materia*, as to each country, ought to have the same construction.

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My answer is, that in my opinion, in the case put by your Lordships, the peremptory challenge ought to be allowed.

PARKE, B. :

It is with regret that I find that I differ from my brethren on the question proposed by your Lordships; but having fully considered the able arguments at the Bar, and the judgments of the several Judges of the Court of Queen's Bench in Ireland, and concurring with the majority of those Judges in their opinion, I think I ought to advise your Lordships in conformity with that opinion.

The question is, whether on an indictment for a felony newly created since the abolition of the benefit of clergy not capital, the prisoner is entitled to his peremptory challenge of jurymen.

This question seems to me to be simply, what is the rule of the common law upon the right of defendants to peremptory challenge. Is it, that it belongs to all felonies, as incident thereto; or is it that it belongs to all capital offences only? Both sides, I believe, agree that the reason why this privilege was given to felonies, was because life was in danger; but it is said by the plaintiff in error, that being given to felonies, *eo nomine*, it becomes an incident to felonies generally, and continues although the reason has ceased. The Crown, on the other hand, contends that the rule and the reason were co-extensive, and that it was given *only to capital felonies because they were capital, and for protection of life.

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I have said that this question is one purely of common law, for it seems to me to be clear that it is not given by any statute. It certainly is not given by express words; and I do not think that the statutes on this subject contain any words which can be construed as meaning to give it. The 9 Geo. IV. c. 54, upon which the existing right of challenge in Ireland depends, contains negative words only; it does not say affirmatively, that in felonies there shall be such a right, it limits that which had existed before; it provides "that no person arraigned for treason or for other felony, shall be admitted to any peremptory challenge beyond the number of 20." The Irish Act 10 & 11 Car. I. c. 9, which has been repealed by 9 Geo. IV. c. 53, and which the 54th chapter re-enacts, is also in negative terms, and does not add to or enlarge the right of peremptory challenge. It leaves the right in all the felonies in which it existed before, but reduces the number of jurors with respect to whom it may be exercised, from 35 to 20.

These statutes therefore leave the question as it was before, a question of common law, and are of no weight, except so far as they may be used as evidence of what the common law was, to be inferred from the understanding of Parliament. For it may be said, that if the Legislature had understood the privilege to be confined to capital felonies, it would have so stated, more especially after the recent passing of the Act 9 Geo. IV. c. 53, by which so many felonies were rendered no longer capital; and that it may fairly therefore be assumed that it was thought by the Legislature that such privilege already belonged to all felonies, otherwise a provision would have been made for continuing *it. And it certainly may be very reasonably conjectured, either that the probable opinion of the framers of these Acts was that there was a right in all cases of felony, whether capital or not, or that they did not mean to take it away by abolishing the benefit of clergy. If the former supposition be correct, it is some, but not the most satisfactory, evidence of the *communis opinio*, one of the sources from which we derive our knowledge of the common law: if the latter, it has no bearing on the present question; for though the Legislature may not have intended to take away the privilege, it certainly has done so, if there was no privilege at common law except in capital felonies, because it has rendered them no longer capital.

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We have, therefore, to determine what the common law upon this subject is, by the light of those authorities from which we usually derive the knowledge of it; the decisions of Courts, the *dicta*

of Judges, the authority of text-writers, analogies from admitted rules, and the prevailing opinion and practice.

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First, the only decisions of Courts are those which have taken place in Ireland. In three cases, if not more, individual Judges have decided, and we learn from the late Chief Justice BUSHE that one of the decisions was with the concurrent advice of the 12 Judges of Ireland (1); and all these decisions are in favour of the Crown, and have been constantly acted upon. There is none in any Court in Ireland to the contrary, nor in England, in any case in which the point has been taken; and this appears to me to be a matter of the greatest weight and consequence. And the authority of these and all decisions ought to bind us, unless they are plainly founded in error; and *whatever may be said as to the degree of certainty with which the law may be collected from the other authorities, it is impossible, I think, to say that those authorities are so clear as to show that they are founded in error. Add to this, the practice in Ireland has been a long time established, to disallow peremptory challenges except in capital cases, though there is a circumstance which may somewhat weaken the value of this practice as evidence of the common law; namely, that it appears, particularly from the statement of the eminent Judge Mr. Justice BURTON, to have prevailed long before the abolition of the benefit of clergy, and was therefore, in respect to offences entitled to clergy, erroneous; for there is no doubt that all such felonies were, strictly speaking, capital, unless clergy was prayed, and in point of law, at the time the jury were sworn and the challenge made, were punishable with death. The practice, however, does still strongly show the prevailing opinion that the privilege did not belong to all felonies, and was confined to those which were capital, though it went too far in dealing with clergyable felonies as not being capital. They were not so substantially and in effect, but in form they were, and there can be no doubt that the accused was entitled in them to his peremptory challenges.

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On the other hand, the English practice has undoubtedly been to allow the right of peremptory challenge in all felonies since the 7 & 8 Geo. IV., the same as was done before; but the effect of this, as evidence of the common law, is greatly impaired, if not altogether destroyed, by two circumstances. In the first place, the objection has never been taken on the part of the prosecution, which in general in this country is conducted by private individuals,

(1) *Reg. v. Gray*, Dix's Rep. 283.

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not by a *public officer ; and there is less occasion for insisting on the strict right, as in the common and ordinary course there is a full attendance of independent jurors, in whom both sides may repose confidence. A second circumstance is, that the practice prevails equally, so far as my experience goes, in misdemeanors, and in all civil cases ; no one ever having heard of any impediment being interposed to the defendant or plaintiff in actions, in modern times, objecting to any number of jurymen without cause, and they are always withdrawn ; yet in actions there is unquestionably no right of peremptory challenge.

It is properly observed by Mr. Justice CRAMPTON, in the report of this case, that there is considerable evidence that the English practice is founded on concession, not right ; and that the Court ought to distinguish between a practice which is the result of strict right and founded upon legal principles, and a practice which is a mere matter of indulgence and concession, growing out of that spirit of candour and fair dealing, and tenderness for persons undergoing the ordeal of public trial, by which the conduct of criminal trials in England is eminently characterized, as well on the side of the prosecution as of the defence : but the same very learned Judge adds, that the rights of the prosecutor and the prisoner have been more jealously and rigidly watched in Ireland ; and the Irish practice, therefore, he properly says, affords a better test of the exact limits of the prisoner's right of peremptory challenge than the English practice does.

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Whilst on this part of the case, I wish shortly to notice that case which was tried before me at Monmouth : *Rex v. Geach* (1), which has been cited *as an authority for allowing the peremptory challenge in a non-capital felony. It cannot be considered as any authority whatever ; it was only an instance of the practice to which I have adverted ; for unquestionably the point was never taken nor considered by me ; the matter passed as one of ordinary course.

The decisions, therefore, being all one way, and the practice such as I have stated, there remain to be considered the *dicta* of Judges, the authority of text-writers on this subject, and the other sources from which we obtain the knowledge of the common law. Many of those text-writers, the more modern particularly, only repeat those who preceded them, and the more correct notion of the common law will be obtained from the older. One of the earliest

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aces of this right is in the Year Book, 9 Hen. V. p. 7. In appeal for murder it was argued, apparently by counsel, that the defendant should have his peremptory challenge of one who had already been sworn on the jury, which had been adjourned for want of jurors; the ground is "that his life was in jeopardy," which shows what the principle was on which the right proceeded. The claim was disallowed there. It seems to have been allowed in 32 Hen. VI. c. 26, *in favorem vite*. Fortescue says (1), "In favour of life, the accused may challenge 35, and this peremptorily; who then in England can be put to death unjustly for any crime?" Staundforde, who writes in the early part of the reign of Elizabeth, states (2), "there is in felony a challenge to be allowed *in favorem vite*;" and the same author, in the same treatise, states petty larceny to be no felony, and consequently the right seems by him to be confined to capital felonies. Lambard, in his *Eirenarcha* (3), written in James the First's time, puts it generally, as allowed in favour of life. Lord Coke (4) says, that peremptory challenge is in treason or felony, *in favorem vite*.

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But the text-writers not merely say that it is given *in favorem vite*, but that it is only allowed on issues which directly affect life; viz., not guilty to the treason or felony. Staundforde, in p. 158, says, "Nota, que cest peremptorie challenge nest destre prise (comme semble), mes ou le vie le prisoner est in jeopardie sur le trial." So where misnomer is pleaded, or other collateral issue, it is not allowed; and this "*comme semble*" does not imply any doubt as to peremptory challenge applying only to cases where life is in danger, but as to its application to collateral issues. It is observed in a note of Mr. Hargrave's Co. Litt. (5), that Staundforde himself thought there was a privilege of challenge peremptory on collateral issues (6); but, on referring to the passage in Staundforde, it may be doubted whether he means more than that in outlawry, the outlaw may challenge for cause; as he gives as a reason, that although he cannot challenge any one worse than himself, being an outlaw, yet as that is the issue to try, whether he is an outlaw or not, such an opinion of him ought to be suspended until he is tried. Lord Coke (7) is to the contrary, because the collateral issue "by a mean concerneth his life;" but this point is set at

(1) De Laud. L. A. c. 27.

(2) P. 157 b.

(3) Bk. 4, c. 14, p. 554.

(4) 1 Inst. 156 b.

(5) 157 b, note 8.

(6) Staundf. 163 a.

(7) 1 Inst. 157 b.

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rest by a judicial decision in *Rex v. Okey* and others (1), and by *Johnson's* and *Ratcliffe's* cases (2).

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This point being so determined, I cannot help thinking that it is a very strong authority to show what the rule of the common law is, and that the right of peremptory *challenge belongs only to that class of charges in which life is in jeopardy. In a book, written by Lord Chief Baron Bolton, afterwards Lord Chancellor of Ireland, called "The Justice of the Peace for Ireland," published about 1688, cited in Mr. Joy's very learned book on peremptory challenge, in which all the authorities are collected, it is said generally, "the common law hath, in favour of life, allowed unto the prisoner his peremptory challenge." In Wingate's Maxims at Common Law, upon an indictment or appeal of treason or felony, the prisoner might, *in favorem vitæ*, challenge peremptorily 35. Sir John Hawles (in his Observation on *Lord Russell's* trial (3), says, "Generally it is a privilege given *in favorem vitæ*." In "Trials per Pais" (4), peremptory challenge is not allowed, except where life comes in question. On the other hand, Finch (5) lays it down generally, in indictments and appeals of felony.

I forbear to cite all the more modern text-writers, which only repeat the ancient authorities in somewhat different language. In some of these the right is said to belong to capital cases (6). In others, as Wood's Institutes, in one edition, 1720, upon an indictment or appeal of death; in another, 1724, p. 642, on an indictment of treason or felony, or appeal of death. Hawkins (7) says it is allowable in all capital cases, and also in misprision of treason. Blackstone (8) says it is allowed in criminal cases, at least capital ones. Comyns (9) says, in petty treason or felony, not limiting the privilege to capital felony; but he is only citing Coke Littleton, 156 b, in which it is said to be *in favorem vitæ*.

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I cannot help thinking, if much weight is to be attached to the more modern authorities, the greater part of them, as well as the more ancient authorities, are in favour of limiting the right to capital cases. These are, then, the *dicta* of Judges: In *Reading's* case (10), Lord Ch. J. NORTH, in a case of misdemeanor, says, "you cannot challenge peremptorily, not being for your life;" and

(1) 1 Lev. 61.

(2) Foster's C. L. 40 and 46.

(3) 9 St. Tr. 796.

(4) 455 (1725); 600 (1766).

(5) P. 414.

(6) Bac. Abr. tit. Jury, E. 9.

(7) Bk. 2, sect. 5, p. 43.

(8) 4 Comm. 353.

(9) Dig. tit. Challenge, c. 1.

(10) 7 St. Tr. 265.

gain (1), “the challenge is only allowed in matters capital, in favour of life.”

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On the other hand, Chief Justice PARKER, in *Macartney's* case (2) says, “There cannot be a special jury in cases of treason or felony; or the party must have the advantage of challenging twenty.” That was, however, a case of trial for the murder of the Duke of Hamilton; and the *dictum* may be reasonably construed as relating to a capital charge, and is not, therefore, of any weight.

Considerable light is also thrown upon the rule of the common law, by the ancient practice of granting a tales in capital cases; it may be granted for a larger number than the first process, to prevent delays from peremptory challenges (3). The defendant had forty tales, because, in appeal of murder, rape, or felony, where life is in jeopardy, there he shall have as many tales as he pleases, because he may challenge peremptorily thirty-five; but in actions between party and party, it must always be under the first number. To the same effect is *Denbaud* and *Woodley's* case (4). Still more light could be thrown upon the question, indeed it would be thereby decided, if it could be established satisfactorily what the rule was in ancient times on the subject of petty larceny. *There is some contradiction in the books upon the question, whether this offence was a felony at common law, and some whether it was at any time punishable with death. These authorities are collected by Mr. Joy, in the treatise to which I have already referred. The result appears to be that it was a felony at common law, and not punishable with death. Was a peremptory challenge allowed in such a case, or not? There is no decision on that subject, one way or the other; and there are circumstances which lead to an inference both against that supposition, and in favour of the right of challenge.

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There are two circumstances from which it may be inferred that no such right existed: first, that it appears to be clear that the consequence of challenging more than the legal number in case of felony, was, at common law, that of the *peine forte et dure*; but the *peine forte et dure* never was applicable to petty larceny (5).

The second circumstance is, that Staundforde, who wrote soon after the statute 32 Hen. VIII. passed, states, 24 b, the challenge to be allowed in all felonies, in *favorem vitæ*, and treats petty

(1) 7 St. Tr. 266.

(4) 10 Co. Rep. 104 b.

(2) 21 Vin. Abr. 301.

(5) 2 Inst. 177; 2 Hale, P. C. 399;

(3) Bac. Abr. tit. Juries, C.; 2 Hawk. P. C. 320.

Bro. Abr. tit. Tales, 8.

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larceny as no felony, says nothing of the right of challenge, and consequently it is inferred that it did not then exist in petty larceny.

On the other hand, *Mr. Napier*, in his able argument at the Bar, very properly urged, that it may be inferred that the same rights belonged to both grand and petty larceny; because if a person is indicted for the greater, he may on the same indictment be found guilty of the lesser offence; as was decided in *Bromley's* case (1).

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To this it may be answered, that the course pursued was beneficial to the prisoner, who had his peremptory challenges upon this form of indictment; and therefore it was no wrong to him to find him guilty of the lesser felony, upon a charge in which he had none. But it must be admitted that the decision in this case does raise a doubt as to the right of peremptory challenge in petty larceny, as it is more correct to suppose that the Court considered the incidents as the same in all respects. The authorities, therefore, leave the question thenceforth as to petty larceny not perfectly clear.

It remains to consider another point which was made the subject of argument at your Lordships' Bar. It was said that peremptory challenges were allowed in cases of misprision of treason at common law, and misprision was a misdemeanor only, not affecting life; and consequently that the privilege was not confined to cases affecting life.

If it were true that in misprision of treason at common law there was this right, it might be explained on the supposition that it was an offence of great magnitude, near akin to the highest known to the law, especially in olden times. This is the explanation given by the Judges in the Queen's Bench in Ireland; on that ground it might be treated as an exception to the general rule. But the authorities collected in the treatise to which I have referred render it extremely doubtful whether the privilege ever did belong to misprision of treason. There is no old text-writer who mentions that such a right is incident to it. Hawkins states (2) that he takes it to be agreed that a peremptory challenge was allowable at common law in all capital cases, and "also in *misprision of treason." The authority cited for the last position is Lord Coke (3), who refers to Brooke's Abridgment, and who also refers to the statute 23 Hen. VIII. only. It is inferred that the statute would not

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(1) Hetley, p. 66.

(3) 3 Inst. 27.

(2) 2 P. C. c. 43, s. 5.

have enacted that no peremptory challenge should thenceforth be admitted in treason or misprision of treason, unless it was already admissible therein in the opinion of the Legislature; and no doubt it is a reasonable, though not conclusive inference. It is remarkable, however, that no trace of such a right should be found in the older authorities; and if it had existed, it might have been expected that the statute 1 & 2 Phil. & M. c. 10, would have restored the course of trial of misprision of treason, as well as of treason, to the rules of common law; which it certainly does not.

It is also very remarkable that the corresponding Irish statute of 10 & 11 Car. I. c. 9, which limits peremptory challenge in Ireland in cases of treason, does not mention misprision of treason; which affords a strong argument that in Ireland, at least, the right of challenge did not exist in cases of misprision of treason, or it certainly would have been limited.

It is said, however, that if it should be held that the right of challenge exists only in capital felonies at common law, the same rule would apply to pleading over in charges of felony, after pleading a special plea. This right is, according to Lord Hale (1), *in farorem vite: Rex v. Taylor* (2); and Lord Hale says (3), he shall not lose his life for mispleading. I am quite prepared to say, that this consequence would follow, but it does not appear to me to weaken the force of the argument.

Upon the whole, it appears to me that I ought to advise your Lordships that the right of peremptory challenge does not exist in non-capital felonies: because the statutes restricting the right of challenge (not giving it) contain negative words only, without any affirmative implication, and leave the common law as it stood; and the common law, upon the weight of authority, is, I think, this, that there is a right of challenge in all capital cases only. The framers of the Act, 9 Geo. IV., I have no doubt, never intended to take away the right, by abolishing the benefit of clergy. Their object was to do away with a fiction which they thought strange and inconvenient, and discreditable to the criminal law of the country; and they supposed that by removing it, the offences would be left precisely in the same condition, in all respects, as if the fiction had continued. The result, therefore, is one which they never contemplated, but it nevertheless is the result, if the position is correct that by the common law the right belongs only to capital

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(1) 2 P. C. 33. •
(2) 3 B. & C. 513.

(3) 1 P. C. 257.

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cases; and then it can only be regretted that the Legislature, in removing a fiction which formed an important part of our old system of criminal law, and was closely interwoven with it, has not foreseen all the consequences, and taken care to avoid them by proper enactments. It is the duty of Judges, not to supply the defects of the Legislature by providing a remedy, but simply to construe the provisions of the statute it has enacted; and I cannot find words to give this privilege in the statute in question, if the effect of making the offence no longer capital, was to take it away.

For these reasons, I humbly state my opinion that the question ought to be answered by saying that the challenge should be disallowed.

[479] POLLOCK, C. B. :

In answer to the question proposed by your Lordships, I am of opinion that the Court ought to have allowed the peremptory challenge. I consider the late statute, 9 Geo. IV., to have put the law in Ireland on the same footing as in England; and the question is, what was the state of the law in England at that time? In this country the right of challenge in such a case is regulated by the statute 22 Hen. VIII. c. 14, s. 6, made perpetual by 32 Hen. VIII. c. 3. By that statute it was enacted, that no person arraigned for any petit treason, murder, or felony, be thenceforth admitted to any peremptory challenge above the number of 20. It is to be inferred from this (independent of any rule of the common law) that a person arraigned of felony may challenge peremptorily to the number of 20. No doubt at the common law such challenges were allowed, but the right is here recognised, and without any reference to any limitation.

The text-writers have undoubtedly laid down as the reason of this indulgence, that it is *in favorem vite*; but there is a wide difference between the reason that may be assigned by a learned commentator, and a condition forming part of the law itself. I cannot find any authority for saying that it is a condition to the exercise of this right, that the life of the accused party must be in danger; and no practice is to be met with, no case can be cited, in which on this ground a peremptory challenge has ever been refused in this country. On the contrary, there has been a practice in this country for many years to allow such challenges.

[*480] It appears to me, on every rule of construction, that when capital punishment is taken away simply, *and a different punishment awarded by law, all the other incidents remain, all the privileges of

the accused continue, not expressly taken away. The right of peremptory challenge is nowhere taken away expressly, and therefore remains. And I come to this conclusion with the more confidence, because as transportation for life (or at all) was a punishment unknown to the common law, I am quite unable to form any opinion in what light this punishment would have been regarded by those who framed the law by which peremptory challenges are in any case permitted.

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TINDAL, Ch. J. :

In answer to your Lordships' question, I would humbly state that the conclusion at which I have arrived, after hearing the argument at your Lordships' Bar, is, that the Court below ought to have allowed the peremptory challenge on the part of the prisoner. And the reason of such conclusion is shortly this, that it is certain that A. B. would, by the common law, have been entitled to his peremptory challenge in the case supposed, if he had been arraigned upon the very same felony before the passing of the statute 1 Vict. c. 85; but it is not equally certain that such peremptory challenge has been taken from him by the necessary operation of that statute. And if the question, whether his right to the peremptory challenge has or has not been taken away, remains open to any doubt, it appears to me, that in accordance with the general principle of decision applied to criminal cases, *tutius erratur in mitiori sensu*, the decision of such question is to be given in favour of the prisoner, who is not to be deprived, by implication of a right of so much importance to him, given by the common law, and enjoyed for many centuries, unless such implication is absolutely necessary for the interpretation of the statute. But I think further, for the reasons I am about to submit, that the question does not remain in doubt, but that the sounder inference to be drawn from the arguments and authorities which have been brought in review is, that the right claimed by the prisoner has not been taken away by the alteration in the punishment for the offence, but still exists as before the passing of the Act.

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It is undoubtedly true, that the ancient authorities, at least the far greater number of them, describe the right of peremptory challenge to be a right allowed "*in favorem vite*." Such is the language of Staundforde (1), of Lambard (2), of Lord Coke (3), of

(1) PL C. 158 a.

(2) Just. Peace, 546.

(3) 1 Inst. 156 b.

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the Author of Doctor and Student (1), of Fortescue (2), of Lord Hale (3), who adds, "because his life is now at stake;" although it is to be observed, in the authority cited by him, viz. Moore, 12. no mention is made of that reason; and many other writers of later date lay down the proposition in similar terms. Finch, however (4), and many other text-writers, state the rule generally as applicable to the case of all indictments and appeals of felony, without any reference to the punishment annexed to that offence. But perhaps this apparent diversity is not of much real importance; for it is well known that at common law all felonies, certainly all but petty larceny, were followed by capital punishment; and as to petty larceny, the books differ whether it is felony or not; Staundforde (5) expressly affirming it not to be felony, *whilst Lord Hale (6) affirms that it is. It may perhaps be considered as felony *sub modo*, and in a qualified and restricted sense, having some, though not all, the attributes and consequences of felony. But whether it be so or not, there has been no ancient authority cited to show that peremptory challenges were not allowed even on the trial for that offence; so that it may be safely laid down that at common law all felonies, properly so called, were capital, and that peremptory challenges were allowed on the trial of all such felonies; in other words, that the right to a peremptory challenge was in all cases an incident to a trial for felony.

The two propositions, therefore, that the peremptory challenge was allowed in all trials *in favorem vite*, and that it was allowed in all trials for felony, are, in substance, one and the same. It is equally true that the challenge was granted *in favorem vite*, and that it was an incident to felony. But the question still arises, whether the expression of the text-writers, "that it was granted *in favorem vite*," carries with it the force and meaning that it was incident to the trial for felony only so long as the punishment for felony continued to be capital, and no longer; that the words imported a limitation or condition upon which the right to such challenge is to depend; or whether the words import no more than a mere matter of description, by the ancient text-writers, of the probable cause and origin of this challenge; which, if given in the case of felony, as a known class of criminal offence, must necessarily, as felony was then punishable, be given *in favorem vite*.

(1) C. 8.

(2) De Laud. c. 27.

(3) 2 Pl. C. 266.

(4) Law, p. 414.

(5) Pl. C. 24 b, 127 b.

(6) 1 Pl. C. 530.

It would certainly be most unsafe to give to this expression of the text-writers the operative force contended *for on the part of the Crown, and to hold the consequence to follow, that because the capital punishment has been taken away by a subsequent statute, the offence still remaining a felony, the right to the challenge has been also abolished. The very same expression has been employed by the highest authority in another instance, in which to draw the same conclusion as is now contended for would be obviously wrong, it being manifest that the expression has been used by way of explanation or analogy only. In the *Cases of Appeals* (1), "It was resolved by the Lord WRAY, Sir THOMAS GAWDY, CLENCH, and FENNER, Justices, that the reason of *auterfois acquit* was, because the maxim of the common law is that the life of a man shall not be twice put in jeopardy for one and the same offence; and that is the reason and cause that *auterfois* acquitted or convicted of the same offence, is a good plea;" and yet it is manifest this must be put by way of example only, for the rule, beyond all doubt, extends equally to misdemeanors as to capital cases. And after all, who is to say, that if the severe punishment of transportation for life had been known to our ancestors, the same jealousy which existed in *favorem ritæ* would not have shown itself to the same extent in favour of the party charged, when liable to a punishment scarcely less severe?

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Some other arguments have been urged at your Lordships' Bar in support of the continuance of the right of peremptory challenge in all cases of felony. It is argued that the right could not have been originally confined to charges which involved the loss of life, as it was allowed in the case of misprision of treason. And it seems impossible to deny, upon any *legal ground of construction, that the statute 33 Hen. VIII. c. 23, which took away the peremptory challenge "in all cases of high treason and misprision of high treason," does by necessary implication admit that the offender had the right to the peremptory challenge in the case of misprision of high treason before the passing of that Act. The same rule is laid down in general terms by Hawkins (2), without any distinction as to the description of misprision of treason, but treating it, as it was generally understood to be, as a misdemeanor only, and not as the subject of capital punishment.

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Again, it was argued, and not without some weight, that the practice of the allowance of benefit of clergy afforded a strong

(1) 4 Co. Rep. 45 a.

(2) Pleas of the Crown, Bk. 2, c. 43, s. 5.

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inference that the right of peremptory challenge has not been for many centuries considered to be confined to felonies that were followed with capital punishment. The extension of the privilege of benefit of clergy by the statute of 5 Anne, to all persons indiscriminately, which privilege for many centuries before was claimable by a large portion of the community, had occasioned many felonies, practically speaking, though not strictly so, to become not capital. And such practice might have been reasonably expected to produce some alteration in the application of the law of peremptory challenge, if it was allowable only *in favorem vite*. But no alteration in the law took place; the allowance of the privilege continued the same. It was urged, in answer to this argument, that the reason for allowing the peremptory challenge, notwithstanding the felony being clergyable, was, because it could not be told until after a man was found guilty whether he would pray the benefit of clergy, or if he *did, whether it would be allowed or not; and that, consequently, all felonies continued capital at the time of the arraignment. But if this reason is correct, it can only be so subsequently to the time of Henry VI., upon the ground suggested by our brother PATTESON, which I will not therefore repeat.

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The right to challenge peremptorily has been uniformly acted on, in England, both in felonies clergyable and not clergyable, without any distinction between them, down to the 7 & 8 Geo. IV. c. 28, English (9 Geo. IV. c. 54, Irish), which abolished the allowance of clergy. For many centuries prior to that time clergyable felonies were practically not capital, although theoretically they still continued to be so; and yet peremptory challenges were allowed equally in both. No instance can be found of any execution for a felony in which the benefit of clergy could be claimed; no instance in which a person convicted of such felony had declined to pray the benefit of it, or in which, where the offender was entitled to it, such benefit has been denied him. Where the offender has persisted in challenging a greater number than twenty in the case of a clergyable felony, the law was, that he subjected himself to the same punishment as if found guilty upon verdict or confession. Where statutes have been passed taking away the benefit of clergy, there is not unfrequently an express provision, that if the offender in case of felony "do challenge peremptorily above the number of twenty persons, he shall not have the benefit of clergy;" such is the case in 4 & 5 Phil. & M.

. 4: the law thus treating the right to challenge peremptorily, without any distinction, whether the felony be clergyable or not.

But without attributing too much weight to either *of the two arguments last adverted to, that which appears to afford the strongest ground for the conclusion that the right to the peremptory challenge still exists, is the inference to be drawn from the language and form of the statutes 22 Hen. VIII. c. 14 (made perpetual by the 32 Hen. VIII. c. 3), and 7 & 8 Geo. IV. c. 28, abolishing the benefit of clergy. Until the passing of the former Act, it was the settled rule of the common law, that wherever a peremptory challenge was allowed, the prisoner might challenge as many as he thought fit under the number of three full juries, that is, not amounting to more than thirty-five; and as it is enacted by that statute, "that no person arraigned for any petit treason, murder, or felony, shall be admitted to any peremptory challenge above the number of twenty," this amounts to a legislative recognition, affirmatively, that the offender has the right to challenge to the number of twenty in all cases of petit treason, murder, or felony. Then follows the statute 7 & 8 Geo. IV. c. 28, English (9 Geo. IV. c. 54, Irish), which by sec. 6 abolishes benefit of clergy, and by sec. 7 expressly enacts, "that no person convicted of felony shall suffer death, unless it be for some felony which was excluded from the benefit of clergy before the first day of the present session of Parliament, or which hath been or shall be made punishable with death by some statute passed after that day." And it appears scarcely conceivable, that when the Legislature had introduced so sweeping an alteration in the consequences of felony, as in effect to render all felonies, within a very limited exception indeed, not capital, that the same statute should, in the same breath, enact (sec. 3), "that if any person indicted for any treason, felony, or piracy, shall challenge peremptorily a greater number of the *men returned to be of the jury than such person is entitled by law so to challenge, in every of the said cases every such peremptory challenge beyond the number allowed by law shall be entirely disregarded,"—unless the Legislature had intended this enactment to apply to felonies with their then present punishment as altered by that statute. This statute of Geo. IV. brings down the enactment of 22 Hen. VIII. to the time at which the statute itself is speaking; in effect it says that now, at the time of passing this Act, every person charged with the commission of any felony shall be entitled to challenge peremptorily

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to the number of twenty; and there appears no legal ground of construction upon which the general expression of "any felony," in the third section, can be held not to comprise the felonies included in sec. 7, that is, felonies from which the benefit of clergy has been taken away. The distinction between felonies capital and not capital, was then for the first time created; and it would not be too much to presume, that if the Legislature had intended that the privilege formerly belonging to all felonies should thenceforth be restrained to capital felonies only, it would have used the expression of "any capital felony," instead of the general expression of "any felony."

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The ground upon which the argument on the part of the Crown in the present case rests, is, that the statute 1 Vict. c. 85, s. 3, must be so construed by implication as to deprive the prisoner of the privilege of this peremptory challenge; that inasmuch as the punishment of death has been directly taken away by the statute of 7 & 8 Geo. IV., which before was indirectly taken away by the allowance of clergy, so, *by implication, the right of peremptory challenge has been also abolished with the capital punishment. But it appears to me that such an implication cannot be resorted to, in the case of a privilege beneficial to a prisoner, and enjoyed by him in practice, if not in strict right, for centuries, unless such implication be unavoidable to give effect to the statute. No such necessity appears to exist; and upon these grounds, I humbly offer as my opinion, in answer to your Lordships' question, that the peremptory challenge tendered in this case ought to have been allowed.

THE LORD CHANCELLOR :

My Lords, I beg leave to say that I do not find I can add anything to the reasonings and arguments of the majority of the learned Judges in this case. I am quite satisfied that the conclusion to which they have come is the correct conclusion, and therefore I shall move your Lordships that the judgment of the Court below be reversed, and that a *venire de novo* should be awarded.

LORD BROUGHAM :

I entirely agree with my noble and learned friend upon this point. I have never, indeed, during the whole course of the argument, entertained any doubt whatever upon it; and I have not been moved at all by the arguments urged and pressed upon us

from the *dicta* to be found respecting the supposed origin of this right of peremptory challenge; namely, that it was *in favorem vitæ*. That is the reason assigned for it; but it does not at all follow that the challenge may not be general. Although the reason assigned for its origin may be justly stated to be *in favorem vitæ*, it is because all felony in its nature is capital; and until clergy is *prayed upon a conviction for that offence, *non constat* that it may not be capital even in clergyable cases.

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I need not enter further into this matter, which has been so fully, so elaborately, and so satisfactorily gone into by the learned Judges, in delivering their opinions. I entirely agree in the motion of my noble and learned friend, that the judgment of the Court below should be reversed; and of course the result will be the granting of a *venire de novo*.

LORD CAMPBELL:

My Lords, I am likewise of opinion that the judgment in this case ought to be reversed; and with all respect for the majority of the Irish Judges who pronounced it, and for the learned Baron who alone of the English Judges approves of it, I hardly think it necessary to say more than that they seem to me to have confounded the reason with the rule. Favour to life may very likely have been the reason why the rule was laid down that, in all cases of felony, the prisoner on his trial should be entitled to peremptory challenge; but there can be no doubt that the rule was established. The rule being established, must remain till altered by the Legislature; and the Legislature, instead of altering it, has recognised its application to felonies which are not capital. It is acknowledged on all hands that the Legislature never contemplated taking away the right of peremptory challenge; and if that right ever existed, it still exists.

Reliance is placed upon the practice of not allowing peremptory challenges on collateral issues; but this is decisive to show that the rule is not that there shall be a peremptory challenge where life is in danger, and in no other cases; for life may well be in *danger upon the trial of a collateral issue, as in the case of *Mr. Ratcliffe* (1), who, upon his identity being decided by the trial of a collateral issue, was led from the Bar to execution.

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I must likewise observe that I should have been reluctant,

(1) 18 Howell's St. Tr. 429; Foster's 2 Howell's St. Tr. 33; and Jardine's Cr. Law, 40. See also *Ruleigh's case*, Criminal Trials, vol. 1, p. 497.

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without strong authority, to sanction a judgment which introduces such an unequal law between the Crown and the prisoner. According to the interpretation of the old statutes on this subject, the Crown, practically speaking, has an unlimited right of peremptory challenge, not being obliged to assign a cause of challenge till the panel is exhausted; and to allow not a single challenge, without cause assigned and proved, to the prisoner, where the punishment may be transportation for life and forfeiture of property, would be inconsistent with the fair administration of the criminal law.

It was ordered that the judgment of the Court below should be reversed, and a *venire de novo* awarded.

1844.
April 18.
Sept. 4.
—
Lord
COTTENHAM.
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CREED v. CREED (1).

(11 Clark & Finnelly, 491—512.)

A testamentary rent-charge issuing out of the testator's real estate under his will has priority over legacies charged by the will upon the same real estate.

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CHARLES CREED by his will, dated the 27th of May, 1814, bequeathed to his wife (the appellant), her heirs and assigns for ever, all his estate and interest in his house, demesne, and lands of Ballinanty, subject to the rent payable thereout, and also his carriage, carriage horses, plate, &c. all freed and discharged from his debts: and he also bequeathed to her an annuity or yearly rent-charge of 1,000*l.* during her life, charged upon and to be issuing and payable to her and her assigns yearly, out of all his real and freehold estates and properties, wheresoever situate, except Ballinanty, and to be paid by two equal moieties in the year, on every 1st of May and 1st of November, the first payment thereof to be made *on such of said days as should first happen after his decease, and he charged and incumbered the same therewith, and empowered her and her assigns to take every remedy for recovery thereof as in cases of rent-service was usual: And he directed that his debts and funeral expenses should be paid as soon as conveniently might be, out of his personal property not before disposed of, if sufficient for that purpose; and that any deficiency thereof should be raised and paid by his trustees and executors, in such manner as they should think proper, out of his real and freehold estates and properties, except Ballinanty; and he charged and incumbered the same

therewith. The testator also bequeathed to his sister, Anne Bond, an annuity or yearly rent-charge of 100*l.* for her life, to be issuing and payable to her and her assigns, out of his real and freehold estates and properties, except Ballinanty, by two equal moieties in the year, on the days before mentioned, the first payment thereof to be made on such of the said days as should first happen after his decease; and he charged and incumbered his real and freehold properties therewith, and empowered her and her assigns to take such remedies for recovery thereof as in cases of rent-service was usual. The testator then bequeathed to his niece Mary Lee, 2,000*l.*, to his niece Mary Rose, 2,000*l.*, to his reputed son Charles Creed, 5,000*l.*, and to his friend John Lyne, 2,000*l.*; these several legacies to be paid by his trustees and executors as soon as conveniently could be after his decease, out of such part of his personal estate as might remain after the payment of his debts and funeral expenses; and such parts of said legacies as might remain unpaid by the personal estate, to be raised and paid by his trustees and executors, in such manner as they should think *proper, out of his real and freehold properties, except Ballinanty, and he charged and incumbered the same therewith. The testator then bequeathed to his servant Alexander Keefe, an annuity or yearly rent-charge of 80*l.* for his life, and to his servant Thomas Tracy, an annuity or yearly rent-charge of 50*l.* for his life; these respective annuities to be paid to them or their assigns by two equal payments on the days before mentioned, the first payment thereof to be made on such of the said days as should first happen after his decease, out of his real and freehold properties, except Ballinanty; and he charged and incumbered the same therewith, and empowered Keefe and Tracy and their assigns, respectively, to take such remedies for recovery thereof as in cases of rent-service was usual. The testator bequeathed all the residue and remainder of his real freehold and personal property to his brother William Creed (father of the respondent Francis Creed), his heirs, executors, administrators, and assigns for ever, and appointed him and David Roche trustees and executors of his will.

The testator died in June, 1814: William Creed alone proved the will, and made sundry payments in discharge of the testator's debts, and on account of the annuities and legacies bequeathed by him. William Creed died in September, 1816, having devised all his property to his children, William, Francis, and Elizabeth Creed.

In February, 1817, the appellant filed a bill in the Court of Chancery in Ireland, against the personal representative of William

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Creed and others, for the purpose of recovering an arrear due to her on account of said annuity of 1,000*l.*, and of a jointure of 150*l.* a year, charged upon some of the lands comprised in *the will of her husband; which bill, amongst other matters, prayed an account of his assets, real and personal, and that the trusts of his said will might be carried into execution.

By the decree made in that cause, it was declared that the trusts of the will should be carried into execution; and it was referred to the Master to take the accounts prayed by the bill, and an account of the sums due to the appellant on foot of her jointure and annuity, with liberty to the creditors and legatees of the testator to prove their respective demands.

The Master, by his report, dated the 6th of March, 1826, reported the several sums due to the testator's respective creditors, annuitants, and legatees; and in the same year a final decree was pronounced in the cause, whereby it was, amongst other matters, decreed that the several sums mentioned in the report should be paid by such of the defendants in the cause as ought so to do, or in default, that the lands therein specified should be sold, and out of the produce thereof the said sums be paid, with interest and costs.

Some of the testator's lands were accordingly sold, and further payments were made to his creditors.

In April, 1830, Francis Creed (the respondent), then the personal representative of the said William Creed, filed his bill against the appellant and others, for the purpose of reviewing the said report of 1826, and the decree founded thereupon; and after some proceedings had in the second cause, a consent order was made in both causes, dated the 14th of December, 1831, by which it was, amongst other matters, ordered that it should be referred to the Master to review the said report, and that said decree should be rectified, and made conformable to such new report as the Master should make.

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Pursuant to that order, the Master made his final report, intitled in both causes, and dated the 12th of January, 1839; whereby, amongst other matters, he found that a sum of 317*l.* 3*s.* 11*d.* was due to Francis Creed, as representative of William Creed, for payments made by William, on account of the annuities devised by the will of Charles Creed; and that there was also due to the said Francis, as said representative, a further sum of 1,989*l.* 8*s.* 7½*d.* for payments made to legatees under the said will; and the Master submitted that Francis Creed was entitled to interest on the said sums, from the 2nd of September, 1816, until paid. He also found

that there was due to the appellant, on account of her annuity of 1,000*l.*, a sum of 20,769*l.* 4*s.* 7½*d.* up to the 1st of November, 1838; and that a sum of 3,498*l.* 9*s.* 8*d.* was due to the other annuitants; and a sum of 19,875*l.* 6*s.* 2*d.* to the several legatees under the said will.

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On the 31st day of January, 1839, a decree was pronounced in both causes, whereby a sale of the remainder of the testator's lands discharged from the annuities was directed, and full payment of his creditors and of the costs of all parties was directed, out of the produce of such sale, and out of funds then in Bank. The decree reserved for further directions the rights and priorities of Francis Creed, as to the two sums of 317*l.* 3*s.* 11*d.* and 1,980*l.* 8*s.* 7*d.*, and of the annuitants and legatees, as to the surplus fund, until the same should be ascertained.

Pursuant to this decree, the lands therein mentioned were sold, and the reported creditors, and the costs of all parties, having been paid, a surplus fund, amounting to 12,000*l.* or thereabouts, remained to be distributed according to the rights of the parties entitled thereto.

On the 4th of June, 1841, the causes were heard before the Lord Chancellor (Lord Plunket), when it was decreed that the respondent, Francis Creed, was entitled to the sum of 317*l.* 3*s.* 11*d.* mentioned in the Master's report of the 12th of January, 1839, together with interest thereon at five per cent. from the 2nd of September, 1816, out of the said surplus fund, and in priority to the rights of all other parties, save as to the costs therein mentioned. And it was further decreed, that the annuity of 1,000*l.*, and the other annuities devised by the testator, were entitled to priority over the legacies bequeathed by him; and that the residue of the surplus fund, after deducting the costs therein mentioned, be allocated to the appellant and the other annuitants, towards payment of the arrears reported due to them respectively on foot of their annuities, rateably in proportion to the sums reported due to them. And it was further decreed, that the said sum of 317*l.* 3*s.* 11*d.* and interest, be deducted from the sums allocated to the respective annuitants, in the proportion in which the sums were paid to them respectively, on foot of their annuities, by William Creed. And it was declared that this decree was without prejudice to the rights of Francis Creed, as representative of William, to recover from the legatees or their representatives, the amount of the sums paid by William to the legatees respectively.

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Francis Creed presented a petition of rehearing, and the said causes came on to be heard on the 6th of December, 1841, before Sir Edw. Sugden, then Lord Chancellor of Ireland, who thereupon ordered (1) that the decree of the 4th of June, 1841, so far as the same declared that the annuity of 1,000*l.*, and the other annuities devised by the testator, were entitled *to priority over the legacies bequeathed by him, and the consequent directions thereon, should be varied: And it was declared, that according to the true construction of the will, the legacies and annuities thereby bequeathed were not entitled to any priority, one over the other, but were to abate rateably, the real and personal estate of the testator not being sufficient for payment thereof. * * *

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Catherine Creed, the annuitant of 1,000*l.*, and plaintiff in the original cause, presented a petition of appeal against this decree, praying that it be reversed or varied, and made conformable to the decree of the 4th of June, 1841.

Mr. Fleming, for the appellant:

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* * The annuitants' rent-charges are specific legacies; and as specific legatees they are in a better position than if the whole estate was devised to them, charged with the legacies. With rent-charges so charged as to amount to specific legacies, a general charge of pecuniary legacies cannot be put in competition. [They cited *Long v. Short* (2), *Kirby v. Potter* (3), and other cases on this point.]

(LORD CAMPBELL: If the freehold estate was directly devised to the widow, charged with these legacies, would they not be payable out of it, though the payments might exhaust it and the widow might not get anything?)

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That question may be answered in the affirmative. *But the widow is in a better position; her rent-charge being a specific legacy, is not overreached by the power given to the trustees and executors to raise the legacies; that power must be construed in reference to the subject for which it was given, the payment of general legacies. * * *

Mr. Cooper and *Mr. Wood*, for the respondents:

This would appear to be a clear case, were it not for Lord

(1) 1 Dr. & War. 416; see p. 428;
4 Ir. Eq. Rep. 525.

(2) 1 P. Wms. 403.
(3) 4 R. R. 342 (4 Ves. 751).

PLUNKET's judgment, which alone made it necessary to go into argument in support of Sir E. SUGDEN's decree. The question is, what was the testator's intention, and what are the rules of construction applicable to it? The general rule is, that where annuities and legacies are given by a will, all the parties intended to be benefited are to take equally, unless a contrary intention appears on the face of the will: *Beeston v. Booth* (1), *Brown v. Brown* (2). * * *

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There is no difference between a pure charge on real estate and a charge with power of distress, as all rent-charges contain, *by implication, powers of distress. * * *

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All the bequests being equally charged on the real estate, must be paid equally. If the annuities were held to be devises of the real estate, as in fact they seem to be, the power to raise and pay the legacies would overreach the devises: *Beale v. Beale* (3). * * *

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Mr. Fleming, in reply. * * *

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LORD COTTENHAM :

Sept. 4.

The duty of the House, in this case, is to decide between conflicting judgments of two learned Judges of high authority; the late and the present Chancellors of Ireland. The fund to be administered arose from the sale of the testator's freehold estate, the personalty having proved insufficient for the payment of his debts. By Lord PLUNKET's decree, the annuities bequeathed to the appellant and the other annuitants were declared entitled to priority over the legacies. By Sir EDWARD SUGDEN's decree it was declared that "the legacies and annuities were not entitled to any priority one over the other, but were to abate rateably, the real and personal estate not being sufficient for the payment thereof." And in the subsequent directions, it treats the real and personal estate as applicable to pay the legacies and annuities in equal proportions.

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This question must be decided by the terms of the will, and the rules which the Courts have applied to similar bequests.

The gift of the annuities is in this form: I leave and bequeath an annuity or yearly rent-charge of so much for life, charged upon and payable out of all my real and freehold estates and properties, except Ballinanty; and I do hereby charge and incumber the same therewith, and also empower the annuitant to take all and

(1) 20 R. R. 287 (4 Madd. 168).

(3) 1 P. Wms. 246.

(2) 44 R. R. 84 (1 Keen, 275).

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every remedy for recovery thereof as in cases of rent-service is usual.

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The gift of the legacies is in this form: After giving several pecuniary legacies without reference to any fund for payment, the will proceeds thus: The said several legacies to be paid by my trustees and executors, *as soon as conveniently may be after my decease, out of such part of my personal estate aforesaid as may remain after payment of my debts and funeral expenses; and such part of said legacies as shall or may remain unpaid by the said personal estate, to be raised and paid by my trustees and executors, in such manner as they shall think proper, out of my real and freehold properties, except Ballinanty aforesaid; and I do hereby charge and incumber the same herewith.

It is first to be considered whether the provisions of the will afford evidence of intention as to the funds to be applied in payment of the annuities and legacies respectively. There is no independent gift of the annuities unconnected with the direction that they should be charged upon and payable and issuing out of the real and freehold estates; and the remedy for the recovery of them is to be such as is usual in cases of rent-service, contemplating that the annuities would continue charges upon the real estate. But the legacies are, in the first instance, to be paid out of so much of the personal estate as should remain after payment of debts and funeral expenses, and so much only of such legacies as shall not be paid out of the personal estate was to be raised and paid out of the real and freehold property; thus negating any intention of applying any part of the personal estate in payment of the annuities, by appropriating it to the payment of debts, funeral expenses, and legacies exclusively, but making it the primary fund for the payment of legacies.

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These provisions clearly prove that the personal estate was to be the primary fund for payment of the legacies, and, as it appears to me no less clearly, that the real estate was to be first applied towards payment of the annuities; for if not so, the personal estate would be applicable in the first instance to *provide for the annuities as well as for the legacies. But the testator declared the contrary, by directing that so much of the personal estate as should not be expended in payment of debts and funeral expenses, should be applied towards payment of the legacies, excluding the application of it towards providing for the annuities, which he had made rent-charges upon his lands. If the gifts of the annuities are to be considered as gifts of specific interests in the real estate, they could not be

affected by a general charge of legacies: *Spong v. Spong* (1). The sale of the land for payment of the legacies ought, therefore, to have been subject to the annuities; and if sold discharged from them, the proceeds must be subject to the same liability.

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c.
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If this be the true construction of the will, the application of the rule of equity to the case is very simple. Each claimant under the will must first resort to the fund primarily liable to his demand. If the personalty had been large and the realty small, the legatees would have had the advantage over the annuitants; and as the reverse has proved to be the fact, the advantage is on the side of the annuitants. It is true that equity aims at equality, and inclines to the construction which promotes it; but the intention, if expressed, must be the guide, and it seems to me to be impossible to put the annuitants and legatees upon the same footing, without doing violence to every provision of the will. Is it, for instance, consistent with the declared intention to treat the personal estate as equally applicable to provide for the annuitants and to pay the legacies? Yet this is the effect of the decree appealed from. To support the decree it must be shown, not only that the legacies *are payable *pari passu* with the annuities out of the realty, but that the annuities are payable *pari passu* with the legacies out of the personalty; otherwise the equality aimed at will not be attained.

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It appears there are but two modes by which the annuities and legacies can be put upon the same footing: first, by considering the annuities as general bequests, and not as specific gifts of interest in the lands; or, secondly, by considering the legacies as specific gifts of interest in the lands. As to the first, gifts of annuities were formerly treated as specific; but when Sir JOSEPH Jekyll, in *Rogers v. Millicent* (2), decided that a direction to lay out money in the purchase of an annuity was only a pecuniary legacy, it was thought impossible to maintain the distinction, and all simple gifts of annuities were held to be pecuniary legacies. Such is the statement of Lord HARDWICKE, in *Lewin v. Lewin* (3). This rule, however, has no application to the gift of a rent-charge or annuity issuing out of land; for that is an interest in the land itself, and necessarily specific. The very case occurred in *Long v. Short* (4), in which there was a devise of a rent-charge out of a

(1) 32 R. R. 16 (3 Bligh, N. S. 84;
S. C. 1 Dow & Cl. 365).

(3) 2 Ves. Sen. 415.

(4) 1 P. Wms. 403.

(2) 2 Dickens, 520.

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leasehold property to A., and a devise of the leasehold itself to B., and of fee-simple land to C.; and it was held that the devise of the rent-charge was as much a specific devise as if it had been of the term itself, and therefore that all three should contribute rateably to the payment of specialty debts. The same point was assumed in the case of *Devenhill v. Fletcher* (1): 100*l.* per annum was given to the testator's wife, to be paid out of a freehold estate, and 500*l.*, which, together with the annuity, was to be in full of dower *and thirds. A question was made whether under the provision, upon a deficiency of assets, the 500*l.* should abate; but no such question was made as to the annuity.

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[His Lordship here referred to the cases, showing that even demonstrative legacies have a preference out of the particular fund applicable over general claims upon the fund, and he concluded his judgment as follows:]

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General legacies do not become specific because they are payable out of the proceeds of real estate; but the gift of the proceeds of the sale of a real estate may be specific, as in *Page v. Leapingwell* (2). So the charge of the legacies upon the real estate does not make them specific, although the annuities payable and issuing out of them are so.

It appears to me, therefore, that the annuities are specific gifts out of the real estate, and that the legacies are not; and consequently, that the annuitants are entitled to the preference given to them by the decree of Lord PLUNKET, which I think ought to be restored, and that of Sir EDWARD SUGDEN reversed.

LORD CAMPBELL:

I heard this case with my noble and learned friend who has just addressed your Lordships: I attended to it most anxiously as it proceeded, and I have considered it very attentively since; and, without any communication with my noble and learned friend on the subject, I find that we have both arrived at the same conclusion.

[*511]

He has stated the *reasons for this judgment so very clearly and accurately, that I do not feel it at all necessary to add anything, and I shal content myself with saying that I fully concur in the view which he has taken.

(1) Amb. 244.

(2) 11 R. R. 234 (18 Ves. 463).

KNIGHT v. BOUGHTON.

(11 Clark & Finnelly, 513—555.)

[THIS was an appeal from a case reported before the Master of the Rolls, in 3 Beavan, 148, under the title of *Knight v. Knight*. A note of this appeal will be found at the end of the report of the case below. See 52 R. R., at p. 90.]

1843.
May 1, 9, 15,
22, 23, 26, 30.

1844.
Sept. 4.

[513]

THE STOCKTON AND DARLINGTON RAILWAY v.
CHARLES BARRETT (1).

(11 Clark & Finnelly, 590—609; S. C. 7 Man. & G. 870; 8 Scott, N. R. 641; affirming 3 Man. & G. 956; 3 Scott, N. R. 803.)

Act of Parliament — Construction of “exportation,” and “port” — Cumulative charge.

The words “shipped for exportation” are not necessarily restricted to an exportation to foreign countries, but may mean exportation in its widest sense; that is, a carrying out of port.

A Railway Act empowered the proprietors to levy on all coals carried along any part of their line, such sum as they should direct, “not exceeding the sum of 4*d.* per ton per mile.” It then went on thus: “And for all coal which shall be shipped on board any vessel, &c. in the port of Stockton-upon-Tees aforesaid, for the purpose of exportation, such sum as the said proprietors shall appoint, not exceeding the sum of one halfpenny per ton per mile.”

Held, that with respect to coals shipped for exportation, this was not a cumulative but a substituted toll.

Held also, that the words “the port of Stockton-upon-Tees aforesaid,” meant the whole port of that name, and was not restricted to the port of the town of Stockton-upon-Tees; that there was not such an ambiguity in the enacting part of the Act as to compel a reference to the preamble of it; and that the word “aforesaid” did not limit the expression to the port of the town as described in that preamble.

Another Act, passed on the same subject, after reciting the former Act, and also reciting that the proprietors had been at great expense in forming inclined planes on the line of railway, authorized them to demand, “for all articles, &c. for which a tonnage is hereinbefore directed to be paid, which shall pass any inclined plane upon the said railway, such sum as the said proprietors shall appoint, not exceeding the sum of 1*s.* per ton:”

Held, that this was a cumulative charge.

Clauses in Acts empowering companies to levy a charge upon the public, as in Railway Acts for example, must, where the meaning is doubtful, be construed favourably for the public.

THIS was an action for money had and received, originally brought in the Court of Common Pleas, to recover three sums of money, which the plaintiff there, Charles Barrett, alleged had been

1844.
March 26,
Sept. 4.

Lord
LYNDHURST,
L.C.

Lord
BROUGHAM.
[590]

(1) Cited in *Pryce v. Monmouthshire* see *Muller v. Baldwin* (1874) L. R. 9 Q. B. 457, 43 L. J. Q. B. 164, 30 49 L. J. Ex. 130, 40 L. T. 630; and L. T. 864.

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unlawfully received *by the defendants as tolls on the carriage of certain coals carried on the line of the Stockton and Darlington Railway, of which they were the proprietors. The cause was tried before Mr. Justice Vaughan at the London sittings after Michaelmas Term, 1837, when a verdict was taken for the plaintiff. The facts found were afterwards turned into a special verdict, for the purpose of obtaining the opinion of the Court on the several Acts of Parliament, under the provisions of which the money now sought to be recovered had been demanded and received.

The defendants were incorporated by an Act passed in the [*592] 2 Geo. IV. c. 44 (1), for making and maintaining *a railway or

(1) The preamble to the 2 Geo. IV. c. 44, is as follows: "Whereas the making and maintaining of a railway or tram-road, for the passage of waggons and other carriages from the river Tees, at or near Stockton, in the county of Durham, to Witton Park Colliery, in the township of Witton, in the said county of Durham, with five collateral branches from the said railway or tram-road; one of them commencing, &c. and terminating, &c.; another, &c.; and the other of such collateral branches commencing at or near the river Tees, and terminating at or near the south-west end of the town of Stockton-upon-Tees, in the said county of Durham,—will be of great public utility, by facilitating the conveyance of coal, iron, lime, corn, and other commodities from the interior of the county of Durham to the town of Darlington, and the town and port of Stockton, and towards and into the North Riding of the said county of York, and also the conveyance of merchandize and other commodities from the said town and port of Stockton to the said town of Darlington, and into the interior of the said county of Durham, and will materially assist the agricultural interest, as well as the general traffic of that part of the country, and tend to the improvement of the estates in the vicinity of the said railways or tram-roads."

[*592, n.]

making and maintaining the said railways or tram-roads, and other the works hereby authorized to be made and maintained; Be it further enacted, that it shall and may be lawful for the said proprietors, from time to time, and at all times hereafter, to ask, demand, take, recover and receive, to and for the use and benefit of the said proprietors, for the tonnage of all goods, wares and merchandizes, and other things, which shall be carried or conveyed upon *the said railways or tram-roads, or upon any part thereof, the rates, tolls and duties hereinafter mentioned, that is to say:

"For all limestone, materials for the repair of turnpike-roads or highways, and all dung, compost, and all sorts of manure, except lime, which shall be carried or conveyed upon the said railways or tram-roads, such sum as the said proprietors shall from time to time direct or appoint, not exceeding the sum of 4*d.* per ton per mile.

"For all coal, coke, culm, cinders, stone, marl, sand, lime, clay, ironstone, and other minerals, building-stone, pitching and paving-stone, bricks, tiles, slates, and all gross and unmanufactured articles and building materials, such sum as the said proprietors shall from time to time direct and appoint, not exceeding the sum of 4*d.* per ton per mile.

"For all lead in pigs or sheets, bar-iron, waggon-tire, timber, staves, and deals, and all other goods, commodities, wares and merchandizes, such sum as the said proprietors shall from

The 62nd section was in these terms: "And in consideration of the great charge and expense which the said proprietors must incur and sustain in

tramroad, from the river Tees at Stockton to Witton Park Colliery, with several *branches therefrom, all in the county of Durham. In pursuance of that and subsequent Acts, 4 Geo. IV. c. 33, 5 Geo. IV. c. 48, and 9 Geo. IV. c. 60, there were made a railway, called the Stockton and Darlington Railway, from the river Tees, at the town of Stockton aforesaid, to Witton Park Colliery aforesaid; and a branch railway from the town of Stockton aforesaid, to Middlesborough, which is upon the river Tees, about four miles below the town of Stockton and within the port of Stockton-upon-Tees; and a double inclined plane, called the Brusselton Inclined Plane, which is on the main line of the Stockton and Darlington Railway. After the making of the railway, and branch, and inclined plane, another railway, called the Clarence Railway, which has also several branches, was made pursuant to subsequent Acts (not necessary to be referred to); which Clarence Railway joined the Stockton and

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time to time direct and appoint, not exceeding the sum of 6d. per ton per mile.

“ For all the articles, matters and things for which a tonnage is hereinbefore directed to be paid, which shall pass the inclined planes upon the said railways or tram-roads, such sum as the said proprietors shall appoint, not exceeding the sum of 1s. per ton.

“ And for all coal which shall be shipped on board of any vessel or vessels in the port of Stockton-upon-Tees aforesaid, for the purpose of exportation, such sum as the said proprietors shall appoint, not exceeding the sum of one halfpenny per ton per mile.”

The 21st section of the 4 Geo. IV. c. 33, after reciting the previous Act, proceeds thus: “ And whereas, by the said recited Act, the said proprietors were authorized and empowered from time to time, and at all times thereafter, to ask, demand, sue for, recover, and receive for the tonnage of all articles, matters, and things for which a tonnage duty is therein directed to be paid, which should pass the inclined planes upon the said railways, or tram-roads, such sum as the said proprietors should appoint, not exceeding the sum of 1s. per ton: And whereas at the time of the passing of the said

recited Act, it was understood and considered that one inclined plane only would be necessary upon the said railways or tram-roads thereby authorized to be made; but inasmuch as by reason of the deviations and alterations hereby authorized to be made, and by which it appears the length of the said railways or tram-roads will be shortened three miles or thereabouts, a greater number of inclined planes will be requisite; Be it therefore enacted, that it shall and may be lawful to and for the said proprietors, from time to time, and at all times hereafter, to ask, demand, take, recover, and receive, to and for the use and benefit of the said proprietors, for all articles, matters, and things which shall pass one or more of the inclined plane or inclined planes upon the said railways or tram-roads, such *sum as the said proprietors shall appoint, not exceeding the like rate, a sum of 1s. per ton, for and in respect of each of the said inclined planes, over and above and in addition to the rates, tolls, and duties by the said recited Act and this Act imposed or authorized to be taken and received for goods, wares, merchandize, and other things which shall be carried or conveyed upon the said railways or tramroads, or any part thereof.”

[*593, n.]

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Darlington Railway, below the Brusselton Inclined Plane, at Simpasture, about 17 miles from the town of Stockton, ran along the Stockton and Darlington Railway, and extended thence for a distance of about 16 miles, to Haverton Hill, and thence by a branch to Samphire Beacon, and thence branched off to Port Clarence upon the river Tees, within the port of Stockton-upon-Tees. Port Clarence and Middlesborough are on opposite sides of the river Tees, and at the distance of one mile from each other. The port of Stockton-upon-Tees, in its extended sense, comprehends not only Port Clarence, which is about four *miles down the river Tees, from the town of Stockton, but also the towns and ports of Hartlepool, which is 12 miles, and of Seaham, which is 18 miles from the same town.

Before the passing of the first-mentioned Act, there was no railway from which coals could be shipped at the port of Stockton-upon-Tees, or along which coals could be carried for exportation there; nor, until the construction of the Stockton and Darlington Railway, were coals shipped for sale in that port.

The defendants had no property in, or control over the Clarence Railway; Port Clarence, and all the staiths, buildings, and places for the shipment of coals there, and all the lands immediately surrounding the same, were the sole property of the Company called the Clarence Railway Company. The two railways meet at a place called the Simpasture Station.

After the making of the said several railways and branches, the plaintiff sent, for the purpose of the same being shipped at Port Clarence, several parcels of coal from the Gordon Colliery, situate eight miles from Simpasture, and several other parcels of coal from the Norwood Colliery, situate nine miles from Simpasture, along the Stockton and Darlington Railway, unto and over the said Brusselton Inclined Plane, and thence along the same railway to Simpasture, where they quitted the Stockton Railway and were carried along the Clarence Railway to Port Clarence; all which coals were afterwards shipped at Port Clarence for London, to be consumed there.

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The defendants demanded and received from the plaintiff (under protest), in respect of the transit of the coals along their railway to Simpasture, tollage after the rate of $1\frac{3}{4}d.$ per ton per mile, being an alleged excess over one halfpenny per ton per mile, *amounting in the whole to the sum of 705*l.* 8*s.* 4*d.*; and also the additional sum of 6*d.* per ton upon the same coals in respect of their transit over Brusselton Inclined Plane, amounting in the whole to 404*l.*

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The plaintiff also, on several other occasions sent, for the purpose of the same being shipped at Middlesborough, several other parcels of coal from the Norwood Colliery, along the Stockton and Darlington Railway, unto and over the said Brusselton Inclined Plane, and thence along the last-mentioned railway to Middlesborough, where the same coals were afterwards shipped for London, to be consumed there. And the defendants demanded and received from the plaintiff, in respect of the transit of such coals along their railway, tollage after the rate of one halfpenny per ton per mile; and also (under protest) the additional sum of 6*d.* per ton upon the same coals, in respect of their transit over the Brusselton Inclined Plane, amounting to 20*l.*

The plaintiff brought this action to recover back these several sums of 705*l.* 8*s.* 4*d.*, and 404*l.*, and 20*l.*; on the ground that the defendants were not entitled to receive tollage after a higher rate than one halfpenny per ton per mile in respect of the transit of the coals along their railway, nor any additional tonnage in respect of the transit of such coals over the Brusselton Inclined Plane; inasmuch as the same coals were intended to be shipped for the purpose of exportation, at places within the port of Stockton-upon-Tees.

The special verdict was argued before the Court of Common Pleas, which adjudged (1) that the defendants were entitled to demand an additional tonnage in respect of the transit of the coals over *the inclined plane, but were not entitled to demand of the plaintiff tollage, after a higher rate than one halfpenny per ton per mile in respect of the transit of the coals along their railway; and that the plaintiff was entitled to recover back from them the sum of 705*l.* 8*s.* 4*d.*, but not the sums of 404*l.* and 20*l.*, or either of them. A writ of error was brought in the Court of Exchequer Chamber, which affirmed (2) the judgment of the Court of Common Pleas. The present writ of error was then brought.

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Mr. Kelly and Mr. Smythe, for the plaintiffs in error (defendants below):

The first question in this case is as to the construction of the words "shipped for exportation." These words must apply to coals intended to be sent to foreign ports. That is the ordinary understanding of the words; and here the Act must be construed upon that ordinary understanding. Such is the rule of construction stated by Mr. Baron PARKE, in *Bennett v. Daniell* (3); and by the

(1) 2 Man. & G. 134.

(2) 3 Man. & G. 956.

(3) 10 B. & C. 500; 5 Man. & Ry. 441.

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same learned Judge, in *Rex v. Pease* (1). The rule thus stated is founded on the authorities collected in Bacon's Abridgment (2). If the words are so construed, it is plain that the toll receivable on these coals for passing along the railway cannot be restricted to that of one halfpenny per ton.

[*597] But besides this, it is contended, secondly, that the tonnage duty on coal about to be exported is not a tonnage duty imposed in substitution for, but is in addition to, that which is payable for coal passing along the railway and not intended for exportation. *The amount of the two duties is a strong circumstance in favour of this argument. * * *

[598] It is contended that the port of Clarence is not, within the words of the Act, "the port of Stockton" (3). The preamble of the Act shows that by these words was intended that part of the river which is on the Stockton side of the Tees, "at or near Stockton," and the "town and port of Stockton;" and does not include what for other purposes may be considered the port of Stockton, namely, something which includes towns many miles distant from Stockton. If the enacting part of the Act is doubtful, the preamble must be taken [*599] to explain *and construe it: Coke upon Littleton (4), *Crespigny v. Wittenoom* (5), *Mason v. Armitage* (6), and *Halton v. Core* (7). The application of the preamble, as the means of construing this enactment, is the more imperatively required here, as the section which gives the proprietors the right to levy the toll upon the exportation of coals, speaks of them as "shipped on board any vessel in the port of Stockton-upon-Tees aforesaid." This last word compels a reference to the preamble; and by so doing shows that the port here spoken of is that which has been before described, and which is the port of the town of Stockton, the port "at or near Stockton." The case of *The Hull Dock Company v. Browne* (8) is in favour of this construction.

As to the toll demanded in respect of passing the inclined plane at Brusselton, it is manifest that as the formation of that inclined plane was the subject of a special expense to the proprietors, the

(1) 38 R. R. 207 (1 Nev. & Man. 690; 4 B. & Ad. 690). See the rule as to the construction of statutes in the opinion delivered by Lord Chief Justice TINDAL, on behalf of the Judges, in the *Sussex Peerage* case, ante, at p. 51.

(2) Tit. Statute, I. 5.

(3) As to the meaning of the word

"port," see 2 Man. & G. 155, where the editors have introduced a very learned note on this subject.

(4) 79 a.

(5) 4 T. R. 790.

(6) 9 R. R. 131 (13 Ves. 25).

(7) 35 R. R. 373 (1 B. & Ad. 538).

(8) 36 R. R. 459 (2 B. & Ad. 43).

Legislature gave them a right to make a special charge in respect the use of it; and whatever the general tolls may be, that that charge is to be made in addition to them.

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Lord BROUGHAM intimated that the Lords had agreed that the word “exportation” must be construed in its largest sense, and that the counsel for Mr. Barrett need not trouble themselves on that point.

Sir Thomas Wilde (with whom were *Mr. Faber* and *Mr. Fitzherbert*), for the defendant in error :

The judgment of the Court below was right in declaring that the toll of one halfpenny per ton per mile was not cumulative. The toll is in the nature of a tax, and *the Act which confers the right to take it must be construed strictly against the parties in whose favour that right is created. No charge can be fixed on the public, except by the clear words of a statute; and this rule holds, notwithstanding what has been said on the subject of viewing this Act as a Parliamentary contract with the proprietors of the railway : *Gildart v. Gladstone* (1), *Hull Dock Company v. Browne* (2). * * *

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The only remaining question then is, whether Port Clarence is within the port of Stockton-upon-Tees. There can be no doubt that it is; there is no such ambiguity in the section imposing the tolls on coals exported, as to require any reference to the preamble for the purpose of explaining it. * * *

THE LORD CHANCELLOR :

Sept. 4.

My Lords, various points were argued at the Bar in this case, as well in the Court below as before your Lordships. The first question relates to the meaning of the terms “shipped for exportation,” in the Stockton and Darlington Railway Act; whether they were confined to exportation to foreign countries, or included shipments of coals to be carried coastwise to other parts of the kingdom. There is not, I think, any reason for adopting the narrower interpretation. The terms are large enough to comprehend both; and if it was a case of doubt, the rule is, in Acts of this nature, to adopt the construction most beneficial to the public. I may further observe, that from the nature of the article, the home market would probably have been at least as much in the contemplation of the Legislature as the foreign.

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Another question is, whether the duty upon coal shipped for exportation, is in addition to the duty payable for all coal carried along the railway? Whether it is cumulative. I think it is not, but, on the contrary, that coal so destined was meant to be excepted from the general rate, and subjected to a lower amount of duty. If it was intended that both duties should be payable, words should have been added, as is usual in such cases, to denote that intention. The argument is, that as all coals are liable to a toll not exceeding 4d. a ton per mile, and as a duty is imposed on coals shipped for exportation, to satisfy these terms the latter duty must be cumulative. But it is sufficient for the purpose of meeting this

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*reasoning to observe that the duty upon all coal shipped for exportation shall not exceed one halfpenny; which is inconsistent with the supposition of its being in addition to the former rate. In a case of doubt, the same rule would apply here as upon the former question.

The third question relates to the place of shipment. The reduced toll is payable for all coal conveyed along the railway and shipped on board any vessel or vessels in the port of Stockton-upon-Tees, for the purpose of exportation. Several quantities of coal were conveyed along the Stockton Railway, to its junction with the Clarence Railway, and thence along the latter railway to Port Clarence, where the coal was shipped for London. Port Clarence is within the limits of the port of Stockton-upon-Tees. It is contended by the defendants that they are not, under these circumstances, limited to the right of demanding the reduced duty; that such reduced duty is confined to cases where the coal is carried along the line to its terminus at or near Stockton; that the port of Stockton-upon-Tees, means the town and port of Stockton, and not the port of Stockton in its more extended sense, which includes Hartlepool, Seaham, and other places several miles distant from Stockton; that the words of the Act are, the port of Stockton-on-Tees aforesaid, and have reference to the preamble, in which the port is always mentioned in connexion with the town, "the town and port of Stockton-on-Tees."

But the words of the clause by which the duty is imposed, make no mention of the town. The duty is upon coals "shipped on board of any vessel in the port of Stockton-on-Tees aforesaid;" and I think, therefore, the word of reference, "aforesaid," has not the effect contended for by the defendants. There is nothing in the Act that requires the coal to be carried *along the whole line.

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the duty is payable by the mile; and the parties may, I think, have the railway at any convenient point, paying only the reduced duty, provided the coals are shipped within the port for exportation. The case comes within the words of the Act, and there seems to be no reason for adopting a more restricted interpretation for the benefit of the Company by whom the Act was obtained.

The remaining question relates to the duty for passing the inclined plane, viz. whether it is payable in respect of coals exported. It is payable for "all the articles, matters, and things for which a tonnage is thereinbefore directed to be paid." This, I think, is a cumulative duty, and is payable without reference to distance. But "all coals" are before mentioned: it would, therefore, apply to them. It is true that a lesser duty is afterwards assigned to coals shipped for exportation; but this I consider is merely a reduction under special circumstances, of the former duty, and does not prevent the charge for the inclined plane, attaching. I think, therefore, that the judgment of the Court below must be affirmed.

LORD BROUGHAM :

My Lords, I am of the same opinion as that which has been expressed by my noble and learned friend. This was a writ of error from the Exchequer Chamber, affirming a judgment given by the Court of Common Pleas in favour of the plaintiff there (the defendant in error here), upon an action of assumpsit by him in the latter Court against the defendants (the plaintiffs in error), to recover back three sums of 705*l.* 8*s.* 4*d.*, 404*l.*, and 20*l.*, exacted by and paid to them in respect of a toll of more than $\frac{1}{2}$ *d.* per ton per mile upon coal carried along the railway, and for the transit of coal over a certain inclined plane called Brusselton Plane, such coals being shipped for exportation at places within the port of Stockton-upon-Tees. A special verdict had been found at the trial; and upon the facts found thereby, the Court of Common Pleas gave judgment that the Company was entitled to take the additional tonnage in respect of the transit of coals along the Brusselton Inclined Plane, but was not entitled to exact more than $\frac{1}{2}$ *d.* per ton per mile for the carriage of the coal along the railway; and that, therefore, the defendant in error (the plaintiff below) was entitled to recover back the first-mentioned sum of 705*l.* 8*s.* 4*d.*, but not either of the last-mentioned sums of 404*l.* or 20*l.* This judgment of the Court of Common Pleas being affirmed in the Court of Exchequer Chamber, the present writ of error was brought, which

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now remains for judgment. Of the five questions which have arisen in the course of these proceedings, two are now given up, and one seemed so clear to your Lordships, that the learned counsel for the defendant in error was stopped from going into it : that was with respect to the point of embarkation. The questions abandoned are, the claim made by the Company to charge $\frac{1}{2}d.$ per ton under the 5th article of the 62nd section of the Act, cumulating with the $4d.$ under the 2nd article ; and the denial of the right of the Company to charge 1s. a ton for passing over the inclined plane where $\frac{1}{2}d.$ per ton is charged, and not merely to take that $\frac{1}{2}d.$ The latter of these points had been given by the judgment below against the plaintiff, now defendant in error, and he no longer resists the judgments in this particular. The first had been found for him, and the plaintiffs in error now abandoned their objection to it. The third question arose *upon an argument used by the plaintiffs in error, that the coals, having been found by the special verdict to have been shipped by the plaintiff below for carriage to London, and therefore for home consumption, this does not come within the meaning of the word " exportation " in the clause or article which restricts the Company to the charge of $\frac{1}{2}d.$ on coals shipped for exportation on board of vessels in the port of Stockton ; but it seemed clear that no such construction could be put upon the word as would exclude a shipment in that port to be carried coastwise to London, which the special verdict found to be the case here.

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The remaining two questions, then, alone stand for decision, and to those my noble and learned friend has applied himself, and I come to the same conclusion with him upon them ; and these are, first (and it is a very material one), does " Stockton-upon-Tees " mean the town or the port of Stockton, the shipments in question being made, as appears by the special verdict at Port Clarence, upon the river Tees, which Port Clarence is found also to be within the port of Stockton, but not within the town of Stockton ; and, secondly, has the Company any right to charge any greater sum per ton than the $\frac{1}{2}d.$? This second question really resolves itself into the first, or, at any rate, is immaterial if the first be plainly against the Company.

The main question, then, relates to the meaning of the words in the Act, " Port of Stockton-on-Tees aforesaid." When I say the Act, I mean the 5th article of section 62 of the Act, which 5th article is an excepting article ; and it is very material to keep in view, with reference to the question in this case, that it is an article

accepting coal from high duty. *The only previous mention of the port is in the preamble, which, in mentioning the termini of the proposed railway, describes one of them as "the river Tees, at or near Stockton." Now, in this place, doubtless the town is intended, and it is intended because the river Tees is mentioned, on which it stands, and it would be insensible to give it any other construction. But observe, no mention is here made of port at all. It is only the town, that is, Stockton alone is mentioned. Afterwards mention is made of "the town of Stockton-upon-Tees;" of course here there can be no doubt. Hitherto nothing is said of the port. But then we have mention made of it; and how? It is said that the projected railway will be useful, "by facilitating the conveyance of corn, iron, lime, corn, and other commodities, from the interior of the county of Durham to the town of Darlington and to the town and port of Stockton;" and "also the conveyance of merchandize and other commodities from the said town and port of Stockton to the town of Darlington, and into the interior of the county of Durham." Here is a totally different phraseology, and it is used respecting a different subject-matter, namely, the commerce of the place; and accordingly we find the "port," as well as the town, mentioned in this place, whereas the town only was mentioned when the question related to the terminus of the railway.

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This may reasonably, therefore, be intended to mean whatever goes by the name of the port of Stockton; and the port of Stockton, by the verdict, is found to include Port Clarence, which appears to be five miles from the town; and even Hartlepool is included, which is 12, and Seaham is included, which is 22 miles distant from the town. It seems quite impossible, therefore, to limit the words in the *5th article of the section, "port of Stockton-on-Tees aforesaid," by the first two instances where the town is mentioned in the preamble; there not being anything said in those two places of the port, which is only mentioned when there is a statement of traffic to and through the port, which may very well mean the whole port; and so the words in the preamble, at the utmost, leave whatever doubt arises on the acting clause unsolved.

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It must be observed that, *in dubio*, you are always to lean against the construction which imposes a burthen on the subject. The meaning of the Legislature to tax him must be clear. It was so held in *The Hull Dock Company v. Browne* (1), which both parties in this

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case relied on, though for different purposes, and which the plaintiffs in error especially cited in support of the argument for them. The like law was laid down by the Court of King's Bench, in the case of a Company claiming against the public. *Gildart v. Gladstone* (1), and other cases, entirely concur in the same reasonable view. The Court there said, in effect, "here is a Company which gets an Act of Parliament to tax the subject; it is incumbent upon that Company to do two things; to take care that the Act of Parliament is made clear and undoubtful, especially upon those clauses by which the Company seeks to impose a burden upon the public; and if the Companies do not choose to take the trouble to do that, let them abide by the consequences; they will not be able to levy the duty." But here, the question is of an exemption or restriction of the duty imposed. The article in question restricts the duty on exported coal to a halfpenny, being $3\frac{1}{2}d.$ less than the second article allows, making it one eighth *part only of the tax. Therefore we are, according to the books cited, to lean in favour of the construction, where it is doubtful, which, by extending the limits of the port, enlarges the bounds of the exemption from the special taxation. Now, as to the import of the case of *The Hull Dock Company* on the first question generally, it has really no bearing whatever upon the contention of the plaintiffs in error, except that it is a case where a port, that of Hull, was held not to comprise all the other ports which for certain specific purposes, revenue purposes, are known and held to belong to it. The grounds on which this was held are clear and satisfactory, and not one of them is to be found in this case, even if there did not exist the general rule already referred to, against applying doubtful clauses in favour of the Company; which rule clearly does apply here, but applies to include, not to exclude, Port Clarence in Stockton Port. And that is the only part in the decision in the case of *The Hull Dock Company v. Browne* which has the least application to this case; for that the other part of the case has no application, is quite clear. Then there were cited the returns to two Commissions, one in *tempore* Elizabeth, the other in *tempore* Charles II. By the former it was found that Scarborough, Grimsby, York, and other ports, are not within Hull, but are members of the port of Hull; York being 40 miles off, or thereabouts. By the latter return to the Commission in Charles II.'s time, it is said by the Crown, "our members of Hull;" that is to

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(1) 11 East, 675; 12 East, 439; 2 Taunt. 97.

ay, Scarborough and others : Hull having been long since granted to the Corporation by the Crown, certainly as early as Richard II. ; possibly, according to the Corporation's argument, as early as Edward I. This plainly indicates that the word " our members," applies to the creeks or outports, and not to Hull, because Hull was not " our members," or " our port." It appeared too, that for all the Humber, all the Trent, and all the Ouse, comprising many places of trade and many ports, there is but one custom-house, viz. that at Hull. This explains why they are called members of Hull. Hence the usual treating of these ports as members of Hull for revenue purposes, and for none other.

Lastly, two other Acts of Parliament, the 42 Geo. III., and the 45 Geo. III., were referred to in that case, in which the words " port of Kingston-upon-Hull " were employed, when it was quite plain that the port of the town of Hull alone could be intended. The case, therefore, of the *Hull Dock Company v. Browne* is completely distinguishable from this, and its import is truly in favour of, and not in opposition to the judgment of the Court below. I therefore concur in the motion of my noble and learned friend, that the judgment of this House must be given for the defendant in error, with costs.

Judgment affirmed, with costs.

HENRY TAYLOR v. WILLIAM CLEMSON AND JOSEPH VAUGHAN.

(11 Clark & Finnely, 610—652 ; S. C. 8 Jur. 833 ; affirming 2 Q. B. 978 ; 2 G. & D. 346 ; 11 L. J. Ex. 447.)

Statute—Railway Company—Inquisition—Jurisdiction.

An Act of Parliament authorized a Railway Company to take lands necessary for the railway works, on payment or tender of such sums of money as should have been agreed upon, or awarded by a jury in the manner directed by the Act : and by the section of the Act for settling differences between the Company and owners and occupiers of, or persons interested in, lands to be taken, it was enacted that if any such person should not agree with the Company as to the amount of purchase-money, or should refuse to accept such purchase-money as should be offered by the Company, or should, for 21 days after notice to him in writing, neglect or refuse to treat, or should not agree with the Company for the sale of his interest, &c., the Company might issue a warrant to the sheriff to summon a jury to assess the sum to be paid for the purchase of the lands ; and that the sheriff should give judgment for such sum.

The Company issued a warrant, purporting to be pursuant to the powers given by the Act, and requiring the sheriff to summon a jury to assess the value of the plaintiff's land, &c. The jury was summoned, and assessed the value ; the owner of the land attending, and protesting that the

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1844.
May 2, 3, 31.
Sept. 4.

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Company had no right to take his lands, as not being described in the schedule to the Act. An inquisition was recorded, purporting to be taken "pursuant to the Act, on the oaths of jurors duly impanelled, in pursuance of the warrant to the inquisition annexed, who assessed the sum to be paid for the property particularised in the warrant, and authorized by the Act to be taken for the railway; whereupon the sheriff, in pursuance of the Act, gave judgment for that sum." Neither the warrant nor inquisition stated that the owner had refused to treat, or had not agreed with the Company for the sale of his land, nor that the Company had served on him the notice required by the Act to be given: but it appeared *aliunde* that he did not agree with the Company, and that he had received the requisite notices:

Held, 1. That sufficient facts were stated in the inquisition and warrant to show the jurisdiction of the sheriff and jury.

2. That the impanelling a jury, and an assessment by them, being facts inconsistent with an agreement, necessarily imply non-agreement; and no inquisition is defective for not stating a fact which is necessarily implied by those that are stated.

3. That notice was waived by the party's appearing, not protesting for want of notice.

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THIS was a writ of error upon a judgment of the Court of Exchequer Chamber, affirming a judgment *of the Court of Queen's Bench on a special verdict, which was found in an action of assumpsit at the Liverpool Summer Assizes, 1839 (1).

The action was brought by the plaintiff in error against the defendants in error, to recover the sum of 26*l.* 5*s.*, being one year's rent, for the alleged use and occupation by them of certain property of the plaintiff, situate at Manchester, and described in his particulars of demand as "a house, cottage, two cellars, and a school-house;" to which description was added afterwards, by amendment, "yard and garden." The defendants pleaded payment of 14*l.* into Court, and *non assumpsit* as to the residue. The plaintiff replied, accepting the money paid into Court, and joining issue on the other plea. It was admitted at the trial, that the sum of 14*l.* was sufficient to cover the plaintiff's claim for rent up to the 24th of June, 1838; but he claimed rent to the 25th of December in that year. The defendants' answer to this claim was, that on the 18th of June, 1838, they had been evicted from the premises, of which they before had been the plaintiff's tenants, by the "Manchester and Leeds Railway Company," who had taken possession of them for the purpose of making the works authorized by their Acts of Parliament.

The substantial question in the case was, whether or not the tenancy of the defendants to the plaintiff was determined by their eviction from the property before described, by the said Company, on the 18th of June, 1838; and that involved the inquiry whether

he Company had, in their proceedings to take possession of that property, duly complied with the requisites of the Act 6 & 7 Will. IV. c. cxi. (local and *personal), intituled "An Act for making a Railway from Manchester to Leeds." The defendants on the record were indemnified by the Company, who were the real defendants as well in the Court below as in this House.

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The parts of the Act material to be stated are as follows :

Sect. 3 makes it lawful for the Company to make and maintain a railway, in the line, &c. or over the lands, delineated on the plans and described in the books of reference deposited respectively with certain clerks of the peace: and sect. 4 recites that "Maps or plans and sections, describing the line of the said railway and the lands in, &c. and upon which the same is intended to be carried, together with books of reference thereto, containing lists of the names of the owners and occupiers or reputed owners and occupiers of such lands, have been deposited" with such clerks of the peace.

"Provided always," by sect. 5, "That it shall be lawful for the said Company to make the said railway and other works upon or through the lands delineated on the said maps or plans, although such lands or any of them, or the situation thereof respectively, or the name of the owners or of the occupiers thereof respectively, may happen to be omitted, mis-stated, or erroneously described in this Act, or in the schedule thereto, or in the said books of reference, if it shall appear to any two or more justices of the peace for the said county palatine of Lancaster, or for the West Riding of the county of York, or for the borough of Leeds (in case of a dispute about the same), and be certified by writing under their hands, that such omission, mis-statement, or erroneous description, proceeded from mistake."

"Provided also," by sect. 7, "That nothing herein contained shall authorize the said Company to take, injure, or damage, for the purposes of this Act, any house or other building which was erected before the 30th of November, 1835, or any ground which was then set apart and used as and for a garden, orchard, yard, &c., other than and except such as are specified in the schedule to this Act annexed, without the consent in writing of the owner and occupier thereof respectively, unless the omission thereof in such schedule shall have proceeded from mistake, and unless it shall be so certified in manner hereinbefore provided for in cases of unintentional errors in the said book of reference."

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And by sect. 59 it is enacted, " That the railway, in crossing the lands of the Bishop of Bristol and Joseph Livesey, shall pass between certain newly laid out streets there, called Allen Street and Charles Street, and so as to leave a space of 24 yards at the least between the railway and one of the said streets; or in case there shall not be a space of 24 yards between the said railway and either or both of the said streets, the said Company shall, if required, purchase such space or spaces as shall be less than 24 yards, and also one-half of Allen Street or Charles Street, or both."

Sect. 138, so far as it is material to the points in dispute, is as follows: " And for settling all differences which may arise between the said Company and the several owners and occupiers of or persons interested in any lands which shall or may be taken, &c. or injuriously affected by the execution of any of the powers hereby granted; Be it further enacted, that if any person, corporation, or trustee so interested or entitled, and capacitated to sell, agree, convey, or release as aforesaid, or any other person, shall not agree with the said Company as to the amount of such purchase-money or satisfaction, recompense, or other compensation as aforesaid, or if any of the parties entitled to receive such purchase-money, &c. shall refuse to accept such purchase-money, &c. as shall be offered by the said Company, and shall give notice thereof in writing to the said Company within one calendar month next after such offer shall have been made, and the party giving such notice shall therein request that the matter in dispute may be submitted to the determination of a jury; or if any of such parties as aforesaid shall for the space of 21 days next after notice in writing shall have been given to the clerk, agent, or principal officer of any such corporation, or to any of such trustees or persons respectively, or left at his last or usual place of abode, or with the tenant or occupier of any lands required for the purposes of this Act, neglect or refuse to treat, or shall not agree with the said Company, for the sale, conveyance, and release of their respective estates or interests, &c. or for the satisfaction, &c. to be paid to them for any damage, &c., or shall by reason of absence be prevented from treating, or shall by reason of any impediment, &c. be incapable of making such agreement, conveyance, or release as shall be necessary or expedient for enabling the said Company to take such lands, &c., or shall not disclose and prove the state of the title to the premises of which they respectively may be in possession, or of the share, interest, or charge which they may claim to be entitled unto or

interested in, in case they shall be required so to do by the said Company, or in any other case *where agreement for compensation for damages incurred in the execution of this Act, or for the purchase of lands required for the purposes of this Act, cannot be made, then and in every such case the said Company shall and they are hereby required from time to time to issue a warrant, either under their common seal or under the hands and seals of three at least of the directors, to the sheriff of the county in which the lands in question shall be situate."

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Then, after certain provisions as to jurymen and witnesses, the section proceeds:

"And such jury shall, upon their oaths, &c., inquire of and assess, and give a verdict for the sum of money to be paid for the purchase of such lands (except &c.), and also the sum of money to be paid by way of satisfaction, &c. either for the damages which shall before that time have been done or sustained, or on any other account, &c., which satisfaction, &c. shall be inquired into and assessed separately and distinctly from the value of the lands so to be taken or used as aforesaid; and the said sheriff, under-sheriff, &c. shall accordingly give judgment for such purchase-money, satisfaction, &c. as shall be assessed by such jury; which said verdict, and the judgment thereon to be pronounced as aforesaid, shall be binding and conclusive to all intents and purposes upon all persons and corporations whatsoever: provided also, that not less than seven days' notice in writing of the time and place at which such jury are so required to be returned, shall be given by the said Company to the party with whom any such controversy shall arise, either by delivering such notice to such party, or by leaving the same at his place of abode," &c.

By sect. 140 it is enacted, "That the said verdicts and judgments, being first signed by the said sheriff, &c., shall be kept by the clerk of the peace for the county or riding in which the matter in dispute shall have arisen, among the records of the Quarter Sessions of such county or riding, and shall be deemed records to all intents and purposes," &c.

By sect. 153 it is enacted, "That in case any party to whom any money shall be agreed or awarded to be paid for the purchase of any lands to be taken or used under or by virtue of the powers of this Act, or for any interest or for compensation as aforesaid, shall refuse or neglect to accept the same, or to convey the premises or interest in the premises purchased, &c., in every such case it shall

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be lawful for the said Company to order the money so agreed to be awarded as aforesaid to be paid into the Bank of England in the name of the Accountant-General of the Court of Exchequer, to be placed to his account to the *credit of the parties interested in the said lands, &c., subject to the control and disposition of the said Court; which, on the application of any party making claim to such money or to any part thereof by petition, is hereby empowered, in a summary way, &c., to order the same to be laid out and invested in the public funds, and to order distribution thereof or payment of the dividends thereof according to the estate, title, or interest of the party making claim thereunto," &c.

By sect. 160 it is enacted, "That upon payment or legal tender of such sums of money as shall have been agreed upon between the parties or awarded by a jury in manner aforesaid, for the purchase of any lands, &c., within three months after the same shall have been so agreed upon or awarded, or if the parties so respectively interested and entitled as aforesaid cannot be found, or shall be absent from England, or shall refuse to receive such money as aforesaid, or shall refuse, neglect, or be unable to make a good title to such lands to the satisfaction of the said Company, &c., then and in any such cases, upon payment of such money into the Bank of England, as hereinbefore directed, to the credit of the parties interested in such lands, &c., it shall be lawful for the said Company immediately to enter upon such lands, and thereupon such lands and the fee-simple and inheritance thereof, &c., and all the estate, use, trust, and interest of all parties therein, shall thenceforth be vested in and become the sole property of the said Company, to and for the purposes of this Act," &c. (1).

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The special verdict stated (among various matters not necessary to be here repeated): That before and at the time of the passing of the said Act, the defendants were tenants to the plaintiff of the premises mentioned in the declaration, at the yearly rent of 26*l.* 5*s.*, payable quarterly; and part of which were in the occupation of other persons, as under-tenants to the defendants: That the said Railway Company, incorporated by the said Act, entered upon and took possession of the same premises on the 18th of June, 1838, and therefrom ejected the defendants and their respective under-tenants: *That the tenancy would have continued, and the plaintiff would have been entitled to such rent, until the 25th of December,

(1) The above sections of the Act, here, are more fully set out in the with others which are not material reports before referred to.

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1838, unless such tenancy was determined by such eviction and proceedings of the Company: That the sum (14l.) paid into Court covered all claim of rent to the quarter-day after the eviction; and therefore the jury found the issue for the plaintiff as to the residue of his claim, unless the defendants ceased to be tenants to the plaintiff by reason of such eviction and proceedings; but if by reason of those proceedings they ceased to be tenants, the jury found the issue for the defendants. The verdict then stated the passing of the said Act of Parliament in 1836, and that previously hereto maps or plans and sections describing the line of railway and the lands through which it was intended to be made, together with books of reference containing the names of the owners and occupiers of such lands, were deposited with certain clerks of the peace: That all the messuages, lands, and tenements mentioned in the notices (1) of the Company, and in their warrant and inquisition afterwards set forth, comprehending (among many other things) the premises in the declaration mentioned, were described in the said maps or plans and books of reference.

The verdict (after stating that the whole capital of 1,300,000l. had been subscribed, &c.) further stated, that the Company, having occasion to take, for the purpose of making the railway and works authorized by the Act, certain messuages, lands, and tenements, including (among others) the premises in the plaintiff's declaration mentioned, on the 28th of October, 1837, caused notices to be served on the plaintiff and defendants, *and others therein named, being the parties interested in the property therein mentioned; which notices (set out in the verdict) required such parties to furnish a statement of their estate and interest in the property, and to treat and agree with the Company for the sale thereof, and for compensation for damage; and that in case of non-compliance with the requisitions of such notices, the Company would issue a warrant to the Sheriff of Lancashire (in which county the property was situate) to summon a jury, to make such assessment as by the said Act, and another Act for amending the same, was authorized: That the plaintiff did not disclose his title to the property required, nor agree with the Company for the sale thereof, or compensation for damage: That the Company, on the 17th of January, 1838, issued their warrant to the said sheriff, requiring him to summon a jury to make such assessment accordingly (2): That notices were given

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(1) See them in 2 Q. B. 987 *et seq.*; 2 G. & D. 346.

(2) The warrant, which was fully set out in the verdict, was in substance

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to all the parties of the time and place of *holding the intended inquisition, with a plan annexed to each, corresponding with the plan drawn on the warrant (a form of the notice was set out in the verdict; it followed the form of the warrant).

The verdict then found that the sheriff, in compliance with the warrant, summoned a jury: That the plaintiff caused a protest to be served on the law clerk of the Company and on the under-sheriff, not objecting to the form or sufficiency of the said warrant, or of any of the said notices, but merely denying the right of the Company to take certain specified portions of the property required by them, as not being sufficiently described in the books of reference or schedule annexed to the said Act: That the omission in such schedule was sufficiently corrected by the justices'

as follows: "To the Sheriff of the county palatine of Lancaster: We, the Manchester and Leeds Railway Company, incorporated by an Act, &c., do, by this our warrant, pursuant to the powers for that purpose given to us by the said Act, require you the said sheriff to summon, &c. a jury of at least 18 sufficient and indifferent men, qualified according to the laws of this realm to be returned for trials of issues in Her Majesty's Courts of Record at Westminster, to be and appear before you, &c., at, &c., on Friday the 2nd of, &c., in order that you the said sheriff may, out of the persons so summoned, &c., swear or cause to be sworn 12, who shall be a jury for the purpose of inquiring of, assessing, and giving a verdict for the sum of money to be paid to Henry Taylor, Ebenezer Thomson, William Clemson, Joseph Vaughan, &c. (naming 11 others), or other person or persons interested, for the purchase of, 1stly, all that piece or parcel of land, with the buildings thereon, delineated on the map drawn in the margin hereof, &c., containing 31,157 superficial square yards, &c.—(then followed particular descriptions of that and other pieces of land, comprising the premises in question);—and which pieces of land, and the buildings *thereon as delineated in the said plan, &c., are about to be purchased and taken under the authority

of the said Act, and used for the purposes of the said railway. And also the sum of money, if any, to be paid to the said H. Taylor, E. Thomson, W. Clemson, J. Vaughan (and others named), or other the person or persons entitled thereto, by way of satisfaction or compensation to the owners or reputed owners and occupiers of the said pieces or parcels of land, cottages, buildings, hereditaments, and premises, or other the persons interested therein respectively. either for the damage, if any, which before the said 2nd of February next, shall have been done to or sustained by the owners or reputed owners or occupiers of the pieces or parcels of land, cottages, &c., and premises hereinbefore mentioned, or other persons interested therein respectively, by reason of the execution of any of the works by the said Act authorized, &c., or for the future temporary or perpetual, or for any recurring damage, if any, which shall or may be done, &c., and the cause or occasion of which shall have been in part only obviated or repaired by the said Company, and which cannot or will not be further obviated or repaired by them; such satisfaction or compensation to be inquired into and assessed separately from the value of the said lands, cottages, &c. and premises so to be taken as aforesaid."

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ertificate (afterwards mentioned) : That the inquest jury attended at the time and place mentioned in the said warrant and notices ; and the plaintiff, under such protest as aforesaid, attended *by counsel, making no other objections to the proceedings than those before mentioned : That no evidence was given of his title, or that of the other parties named in the proceedings, to the property in question : That he examined witnesses to enhance the value of the property, but did not require his interest therein to be assessed separately from that of the other parties named in the notices ; and that the interests of those parties were not required to be assessed separately : That an inquisition, verdict, and judgment were taken and drawn up in writing, signed by the sheriff, &c., and deposited with and kept by the clerk of the peace among the records of the Sessions.

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The special verdict then, after setting forth the inquisition, verdict, and judgment of the sheriff thereon (1), and after finding

(1) They were as follows : “ Lancaster to wit : An inquisition, verdict, and judgment had, taken, &c., on Friday, 2nd of February, 1838, before me, T. B. C., Esq., sheriff of, &c., pursuant to an Act (stating said Act), on the oaths of (jurors’ names), sufficient and indifferent men, qualified according to the laws of this realm to be returned for trials of issues in Her Majesty’s Courts of Record at Westminster, here duly impanelled, summoned, and returned by the said sheriff of the said county palatine, in pursuance of and in obedience to a warrant made and issued under the common seal of the Manchester and Leeds Railway Company, to me directed and delivered, and hereunto annexed ; who being sworn and charged as in and by the said warrant directed, upon their oaths present and say, that they have inquired of, found and assessed, and do find, assess and give this their verdict for the sum of 17,000*l.*, to be paid by the said Manchester and Leeds Railway Company, for the purchase of, firstly, all that piece or parcel of land, with the buildings thereon, delineated in the plan drawn in the margin of the said warrant, and therein coloured blue, containing in the whole 31,157 super-

ficial square yards or thereabouts, and forming part of the parcel of vacant land, and also forming part of the site of the two cottages and yards thereto belonging, and also of the outbuildings and yards belonging to two other cottages hereinafter mentioned, that is to say (describing them) ; and which vacant land, cottages, and yards and outbuildings are shown on the map or plan of the said railway, deposited at the office of the clerk of the peace for the *said county, on the 13th of November, 1835 : And also all that piece of land lying on the north-east of St. George’s Street aforesaid, with the cottages, school, and other buildings thereon, which in the said plan drawn in the margin of the said warrant is coloured green, and containing 7,788 superficial square yards or thereabouts, being part of a certain piece of vacant land and buildings thereon erected, which in the said map or plan and book of reference deposited with the clerk of the peace aforesaid, is (with certain other property) numbered 25 : All and singular which said premises are in the said warrant particularized, and are by the said Act of Parliament authorized to be taken by the said Manchester and Leeds Railway Company, for the purposes in the

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the identity of the property *mentioned in the respective notices, warrant, and inquisition, including the property mentioned in the declaration, and after stating a requisition by the law clerk of the Company to the plaintiff, to furnish to them an abstract of his title to the property, and his refusal to accept the purchase-money awarded, or show his title to the property, stated, that after such refusal, a cheque was drawn by two of the directors of the Company on their bankers, requiring them to pay plaintiff 17,000*l.*, the amount assessed by the jury as the purchase-money of the property required by the Company, and that sum was paid by the said bankers into the Bank of England, in the name of the Accountant-general of the Court of Exchequer, to the credit of *Ex parte Henry Taylor*, Esq. and the other persons named in the proceedings, and of all *other persons interested in the property mentioned in the inquisition: That on the 18th of June, 1838, the Company entered upon and took possession of all the said property, and evicted the defendants and their under-tenants from the premises in the declaration mentioned, claiming title to all the property under their Act of Parliament, and the said warrant, inquisition and judgment, and the payment of the amount assessed into the Bank of England.

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The verdict further found, that all the above-mentioned property was sufficiently described in the plans and books of reference deposited with the clerks of the peace: That all the messuages, lands, and tenements in the said notices and warrant mentioned, as were required by the said Act to be specified in the schedule thereto annexed, were sufficiently specified therein, with the exception of the premises mentioned in the plaintiff's declaration, which the jury found to have been wholly omitted in the said schedule: The verdict then, after finding certain facts as to the situation, description, and occupation of the property so omitted, and setting out a notice by the law clerk of the Company to the plaintiff.

said Act mentioned. And the jurors, &c. do further present and say, that they have inquired of and do find that there is no sum of money to be paid by the Manchester and Leeds Railway Company by way of compensation and satisfaction for any damage, injury and loss by them directed to be inquired of, as in the said warrant mentioned; and the jurors aforesaid are not required to settle what shares and proportions of the purchase-money

and compensation-money aforesaid, by them assessed as aforesaid, should be allowed to any person or persons having a particular estate, term or interest therein. Whereupon I, the said sheriff, in pursuance of the said Act of Parliament, do pronounce and give judgment for such purchase-money so assessed as aforesaid by the said jurors, according to the direction of the said Act. In witness whereof, &c."

defendants, and other persons interested, of an intended application to justices of the peace for a certificate that such omission in said schedule proceeded from mistake, stated, that such application was accordingly made on the 28th of October, 1837, and was attended by the plaintiff, with his counsel and attorney, and that a certificate of such omission by mistake was granted on the same day, under the hands of two justices of the peace: That the plaintiff appealed against such certificate at the general Quarter Sessions of the peace, by which it was confirmed: That the property mentioned in the particulars *of the plaintiff's demand, other than the above-mentioned yard and garden, was sufficiently specified in such certificate and schedule thereto: That the yard and garden (the length, breadth, and boundaries of which were stated) were respectively parcel of and included in the description of the said house, specified in the schedule to the certificate, and occupied therewith as such parcel thereof; but the jury referred to the Court the question, whether they ought to have been specified separately from the said house, of which they found the said yard and garden to have been and to be such parcel as aforesaid, and so included in such description, and occupied therewith as aforesaid. The jury further found, that the Company had executed a portion of the railway so as to cross lands of the Bishop of Bristol and Joseph Livesey, mentioned in the 57th section; that the railway passed obliquely between streets there called Allen Street and Charles Street, so as to leave a space of 24 yards between the railway and Charles Street, but not that space between the railway and Allen Street; but that the Company had, before making the railway, purchased the whole of the last-mentioned street and the intervening space; and that that portion of the railway was made in the line delineated in the deposited plans, without any deviation therefrom.

Judgment was entered up by consent on this verdict in the Court of Queen's Bench, for the defendants in error; whereupon the plaintiff brought a writ of error in the Exchequer Chamber, and after argument there, the judgment was affirmed (1). The plaintiff then brought the present writ of error.

Mr. Kelly and Mr. T. F. Ellis, for the plaintiff in error :

The Judges of the Queen's Bench gave no opinion on this case; judgment was there entered up on the special verdict by consent, and a writ of error was brought in the Exchequer Chamber.

(1) 2 Q. B. 978; 2 G. & D. 346

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(LORD BROUGHAM : I have never known that course to be taken ; the result is, that we have no opinion from the Judges of the Queen's Bench on a case from their own Court.)

It is much to be regretted that this course was taken, because this is a case peculiarly proper for the Court of Queen's Bench ; the question being, whether an inferior tribunal had jurisdiction or had duly exercised it.

There never was a case in which the authorities are so uniformly opposed to the judgment of the Court below. * * *

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The question then is, whether the tribunal created under this Act has any privileged exemption from the necessity, incident to all inferior tribunals, of stating in its judgment the grounds of its jurisdiction ? The authorities all show conclusively that such defects as these are fatal : [*Doe d. Payne v. The Bristol and Exeter Railway Company* (1) ; *Rex v. Croke* (2).]

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(LORD BROUGHAM : It appears in *Rex v. The Trustees of Swansea Harbour* (3), that Mr. Justice LITTLEDALE thought that, from the fact of summoning a jury to assess the purchase-money, a difference or non-agreement was to be presumed ; and that the appearance of the party at the inquisition was enough to give jurisdiction ; and Mr. Justice WILLIAMS seems to concur on both points.)

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That *obiter dictum* of Mr. Justice LITTLEDALE is the only semblance of authority to support the judgment in this case. * * In *Rex v. The Mayor, &c. of Liverpool* (4), Lord MANSFIELD says that notice ought to have been given to the parties interested in the lands, and that it ought to have appeared on the inquisition, and also to show that there was a jurisdiction. In *Rex v. Bagshaw* (5), the Court quashed an inquisition and an order of trustees of a road, because it did not appear on the face of the proceedings that any notice had been given to the owners of the land ; for that notice to the parties interested was the foundation of the whole proceedings below, and that, therefore, it should have been stated ; for if no notice had been given, the trustees had no jurisdiction. * * In *Rex v. All Saints, Southampton* (6), on a question whether the examination of a soldier before justices was admissible evidence, it not appearing

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(1) 55 B. B. 633, 644 (6 M. & W. 515.
333, 334).

(2) Cowp. 26.

(3) 8 Ad. & El. 448 ; 1 P. & D.

(4) 4 Burr. 2244.

(5) 7 T. R. 363.

(6) 31 B. R. 296 (7 B. & C. 789).

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on the examination, or otherwise, that the soldier was, at the time of his examination, quartered where the justices had jurisdiction, Mr. Justice BAYLEY said, "The jurisdiction must appear on the face of the order;" and Mr. Justice HOLROYD added, "The rule that in inferior Courts the maxim *omnia præsumuntur rite esse acte* does not apply to give jurisdiction, has never been questioned." In these few words of those learned Judges, the question in this case is put on its true grounds. In *Rex v. The Inhabitants of Hulcott* (1), an order of a justice for discharging a servant from service, under the statute 5 Eliz. c. 4, was declared void, because it did not appear on the face of the order that she was a servant in husbandry. Lord KENYON there said, "As it does not appear on the face of the order that the justice had jurisdiction, the pauper was not legally discharged from her service."

(LORD CAMPBELL: Must all those requisites to the jurisdiction in the present case be set out in the warrant to the sheriff?)

If not expressly set out, they must appear by necessary intendment.

(LORD BROUGHAM: The Judges in the Exchequer *Chamber say that the warrant and inquisition taken together, sufficiently show jurisdiction (2).)

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They cannot be taken together for such purposes; the judgment itself must, on the face of it, show these requisites to the jurisdiction. But the warrant is equally defective in this respect as the inquisition. The objections that have been urged against the latter apply equally to the former, treated either as an independent instrument, or as incorporated by reference in the inquisition. The Judge giving his judgment should thereon state the facts on which he exercises jurisdiction, and not refer to an instrument in which the facts, if stated, are stated by another person, and which may be true or not true.

(LORD COTTENHAM: Suppose the requisites of the Act not complied with, would the judgment of the sheriff pass the lands, and be binding on the parties?)

Certainly not. The judgment would be void, as not stating the

(1) 6 T. R. 583.

(2) 2 Q. B. 1032, 1034.

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requisites to the jurisdiction. All the authorities that have been cited show that.

(LORD CAMPBELL: How can the sheriff know those requisites, unless they are stated in the warrant of the Company to him ?

LORD BROUGHAM: All that the sheriff knows is from the warrant ; if those requisites do not appear on it, is he to know them *aliunde*, and tell the person handing him the warrant that they are not there stated ? That would be dangerous doctrine.)

[*631] The sheriff is not here a mere ministerial officer ; but at all events he ought to inquire whether the warrant is sufficient. He holds a court, as Judge, with a jury, at the requisition of a private party, for that party's benefit, and examines witnesses : acting as *Judge in an inferior Court, under an Act of Parliament, he should see that his Court was well constituted, and his jurisdiction well founded. * * *

[632] The effect of all the authorities is that, first, the tribunal, consisting of the sheriff and jury, must be constituted with jurisdiction ; and, secondly, the jurisdiction must be shown on the face of the inquisition and judgment. The inquisition here is a judgment recorded, binding the parties for ever ; and it is essential that the judgment should show on the face of it that the tribunal had jurisdiction to pronounce it. * * *

[634] *Mr. Erle and Mr. Tomlinson*, for the defendants in error :

[635] The argument for the plaintiff is, that there is some rule of law requiring all the requisites to the sheriff's jurisdiction under the Railway Act, to be set forth, as well in the inquisition as in the warrant to the sheriff. It is not stated what this rule of law is, but many cases are referred to for the purpose of tracing a *jus vagum*, which is nowhere laid down. * * The sheriff was no more bound to take cognizance of the want of notice of the inquisition, than a Judge at Nisi Prius is of want of notice of trial ; in both cases, if the party appears, he is presumed to have waived all objections to want or form of notice. The plaintiff in error, it is true, protested against the sheriff's proceeding ; not however for want of notice, but because the property required by the Company was not within the delineated line of railway, nor mentioned in the schedule to the Act. * * *

The cases of *Reg. v. Swansea Harbour* (1), and *Reg. v. The Committee-men for the South Holland Drainage* (2), in both which similar objections made to inquisitions, under Acts of Parliament for taking lands, were overruled, are precisely in point, and decisive of the present case. An application for a *certiorari* to quash this inquisition, was twice refused in the Court of Queen's Bench (3). The case before the House receives no support from that of *Payne v. The Bristol and Exeter Railway Company* (4). There, it is true, Mr. Justice LITTLEDALE threw out a *dictum* that all the requisites of the Act should be set out in inquisitions; but the judgment quashing the inquisition was not founded on any such defect, but on the objection that the condition precedent to the taking of any land, namely, the payment of the 1,500,000*l.* subscribed, was not complied with. The cases of *Rex v. Croke* (5), *Rex v. Manning* (6), *Rex v. The Mayor, &c. of Liverpool* (7), *Rex v. Bagshaw* (8), * * and other cases that have been cited, are clearly distinguishable from this, and are not applicable. * * *

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In the present case, the facts stated in the special verdict as found by the jury, show a full compliance by the Railway Company with all the directions and *provisions of the Act on which their proceedings were founded; that in such proceedings was stated everything which the Act required to be stated in them; and that the Company thereby gained a title to the premises in question, by which the defendants in error were lawfully evicted, and their tenancy under the plaintiff determined. Upon the face of the various proceedings set forth in the special verdict, the jurisdiction to adopt those proceedings sufficiently appears, expressly or by fair and necessary intendment. If there is any formal defect of statement to warrant such proceedings, such defect is supplied by the special findings of the jury in the special verdict; showing that all which was necessary to give jurisdiction under the statutes, did really and in fact take place. And such defect, if it existed, would only subject such proceedings to be quashed for want of form by *certiorari* or other proceeding in the nature of a writ of error, and cannot now be relied upon as wholly avoiding them, especially in a proceeding against third parties, against whom the recorded and unreversed judgment founded on those proceedings has been enforced.

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(1) 8 Ad. & El. 439.

(2) 47 R. R. 618 (8 Ad. & El. 429).

(3) 8 Ad. & El. 413, 419.

(4) 55 R. R. 632 (6 M. & W. 320).

(5) 1 Cowp. 26.

(6) 1 Burr. 377.

(7) 4 Burr. 2244.

(8) 7 T. R. 363.

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As to the omission in the schedule to the Act; such omission was supplied by the certificate of the justices and schedule thereto, set forth in the special verdict; and the omission in the last-mentioned schedule of the yard and garden, is cured by the finding of the jury that they are and were parcel of and included in the description of the house specified in that schedule.

Mr. Kelly, in reply. * * *

Sept. 4.

LORD BROUGHAM:

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This was a writ of error from a unanimous judgment of the Court of Exchequer Chamber. A special verdict had been found at the trial, and judgment was entered up in the Queen's Bench, of consent, without any argument, in order that the writ of error might be brought at once. It is to be lamented that this course has been taken, as we are thereby deprived of the light which might have *been thrown upon the question by that Court, of all others the most practised in the discussion of the points raised in this case. The principal point raised, refers to an inquisition which was taken under a local Act, 6 & 7 Will. IV. c. cxi., for making a railway between Manchester and Leeds; and the main ground of the objection taken here, as before taken in the Court below, is that the jurisdiction of the Court, the sheriff and jury, which took the inquisition and gave judgment upon it, is not duly set forth; so that this Court, and the Courts of Queen's Bench and Exchequer Chamber, have no means of knowing that the inferior Court had the jurisdiction which it exercised.

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Now it cannot be doubted, that where a court of limited jurisdiction, limited either in point of place or of subject-matter, assumes to proceed, its judgment must set forth such facts as show that it has jurisdiction, and must show also in what respect it has jurisdiction. But it is another thing to contend that it must set forth all the facts or all the particulars out of which its jurisdiction arises. Thus, if a power of commitment or other power is given to two justices of a county, their conviction or their order must set forth that they are two such justices of such county, in order that it may be certainly known whether or not they constitute the tribunal upon which the statute, they assume to act under, has conferred the authority to make that order, or to pronounce that conviction.

In this case, it is set forth in the inquisition that its caption was

before the Sheriff of the county palatine of Lancaster, and was pursuant to the Act, citing it by its year and title, and in pursuance of a warrant made under the seal of the Railway Company and directed to the sheriff, which warrant is annexed and forms part of the inquisition; that the jurors were *qualified to try issues in the Courts of Record at Westminster (which is the qualification required by the Act), and that they found and assessed a certain sum, namely 17,000*l.*, as the sum to be paid by the Company to the owner of the land to be taken by the Company, to the plaintiff in error; and that the sheriff gave his judgment for such sum so assessed, according to the direction of the Act. It is not denied that the Act gives all this jurisdiction; but it is said that before any jury could be impanelled under the Act, it was necessary that there should have been a disagreement between the parties; and that no such disagreement being set forth, the condition precedent to the jurisdiction vesting under the Act, is wanting. It is further objected that the notices were not sufficient, not being such as the Act requires.

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It is, however, to be observed, that the mere impanelling a jury, and instituting the inquiry, seems a sufficient evidence of a disagreement. It is necessary that the jurisdiction should appear, but there is no particular form in which it must be made to appear. The Court above, which has to examine, and may control the inferior Court, must be enabled somehow or other to see that there is jurisdiction, such jurisdiction as will support the proceeding; but in what way it shall so see is not material, provided it does so see. This is the language of the Court of Queen's Bench in one of the cases cited and mainly relied upon by the plaintiff in error, but cited for another purpose, namely, *Rex v. The Mayor and Corporation of Liverpool* (1); and in *Rex v. Manning* (2) it is said that the authority must appear on the face of the order, though no express adjudication may be necessary.

In the case of *Rex v. The Trustees of Swansea Harbour* (3), one objection of many that were taken, was the very objection now under consideration. It was said that the fact of disagreement did not sufficiently appear; but Mr. Justice LITLEDALE said it did appear, else why was a jury summoned? And Mr. Justice WILLIAMS agreed with this view. It is said that these were *obiter dicta*. But to this it must be replied, that the objection having been

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(1) 4 Burr. 2244.

(3) 8 Ad. & El. 439.

(2) 1 Burr. 377.

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specifically taken, the opinion of the learned Judges, in displacing that objection, is not *obiter*; it is their answer to the objection, which would have put an end to the case if it had been allowed. It is their decision upon one of the points, and a cardinal point in the cause; upon which point the cause might have been, and must have been annihilated, if they had not given that answer to the objection. Now both those learned Judges overruled the objection, and no other Judge objected to what they laid down; therefore the whole Court must be taken to have overruled that objection, taken and argued before it, and to have disallowed it upon the ground stated; a ground quite as applicable to this objection as it was to the objection taken there. And Mr. Justice WILLIAMS adds, that the parties appearing by counsel was a complete answer to any want of preliminary circumstances; that is circumstances before the caption of the inquisition, such as that of notice; and he is fully borne out both by all principle and by all authority in this opinion, an opinion applicable likewise to the present case: by principle, for no Court ought ever to sanction a party coming into a Court and taking his chance of prevailing there, reserving his objection to the proceeding for want of notice, for example, or any other matter *in pais*; and *then, when he is disappointed, turning round and objecting, either that there never had been a disagreement, or that he had no notice to attend. He did attend; he thus waived the claim to notice; and he must not be heard to deny that he had that sufficient knowledge of the proceeding which his act, his attendance, proves him to have had, or, which is the same thing, proves him to have been wholly indifferent about. By the authority of decided cases the same position is equally supported. In *Rex v. Bagshaw* (1), relied on by the plaintiff in error, an inquisition was sought to be quashed upon motion, because the Act under which it had been taken had required 20 days' notice. On cause shown against the rule which had been obtained upon this ground, the counsel in support of the inquisition relied on the fact of counsel appearing for the other side, as a waiver of the notice: but the Court said that it did not appear on the face of the inquisition (and of course the Court in that case could only have the inquisition before it) that the defendant's counsel had appeared; it merely set forth, said their Lordships, "that counsel and evidence had been heard; and *non-constat* (said the Court) that any were heard except for the plaintiff, which clearly would be no waiver."

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Therefore the rule was made absolute for quashing the inquisition. But it is quite plain that if it had appeared that the defendant's counsel had attended, this would have been held a waiver, and the rule would have been discharged.

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But all the cases of waiver are cases for the defendants in error here. With respect, for instance, to all defects in that process which is the foundation of a suit, I hardly know any such defect which may not be cured by the party appearing to it, and attending *as if he had had his notice, and as if the process were valid. I remember a case which I looked at lately, with a view to another point entirely, the case of *Harris v. Mullett* (1): a most grievously fatal defect was in the process there. It was an action of trespass; and the writ with which the party was served, set forth that he was summoned to attend on the first day of Saint —, without saying whether it was St. Martin or St. Hilary, or, in short, what Saint it was, on whose matin or morrow the defendant was desired to appear. He took this objection, and the Court said, "That is a very good objection, no doubt, and the process ought to be set aside for irregularity." Oh, but, says the other party, I have an affidavit here, which shows that upon his being served with the process calling upon him to appear on the morrow of Saint —, he sent his wife,—which he did not deny that he had done,—to the sheriff or officer on the other side, to say that he would take the proper steps and pay the money wanted. "Then," said the Court, "he has gone a great deal further than was sufficient to waive the notice." If he had relied upon the blank in the Saint's name, he ought not to have sent that message to the Court's servant. And so the Courts have lately held with respect to all defects in pleading. There is a rule to that effect in each of the three Courts, the Queen's Bench, Common Pleas, and the Exchequer: After an Act which I brought into this House in 1832, respecting the new forms of pleading, they made a general rule that when any one step is taken by a party after an irregularity known to him, that step should be a waiver of the irregularity: which I must take leave to say is rather to be held as a declaration *of the common law as to irregularities in general, than a new rule introduced; because it is the constant and invariable rule in all courts of equity, as well as of law.

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It is clear by the special verdict in the present case that the plaintiff in error did appear, and that he gave evidence as to the

(1) 1 Taunt. 59.

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value of the parcels in question. He is found to have attended by his counsel, and to have examined witnesses to that value. He attended, indeed, under protest, but he did not protest that there had been no disagreement, or that due and sufficient notice had not been served upon him; his protest was distinctly confined to one point. The protest is set forth in the verdict; and upon looking at it, I find that it was a denial of the Company's right to take the lands and messuages, and the sheriff's right to assess their value, solely on the ground that the premises were not sufficiently described in the books deposited, or in the schedule to the Act: but there was no protest whatever, either for want of agreement, or want of notice. This protest, therefore, instead of operating against the attendance by counsel being taken as a waiver, is the best confirmation of the waiver; because it confines the objection taken against the proceeding to matters respecting which, either the jury made no inquiry, or the objections now relied upon had no application.

It appears to me, upon the whole, that the judgment pronounced in the Exchequer Chamber was correct, and ought to be affirmed by this House giving judgment for the defendants in error.

LORD COTTENHAM :

[*646] If the arguments of the plaintiff in error be well founded, the Railway Company acquired no title to the lands in question; and that, not *from any omission of what the Act required them to do for the purpose of acquiring a title, but from a defect in the form of the inquisition by which the value of the lands was assessed. If the objection be fatal to the title of the Company to these lands, there can be no doubt but that similar objections will be found to apply to very many titles derived under the various Acts of Parliament which have, of late years, been in operation for the carrying on of public works.

The special verdict finds that everything was done which the Act required, for the protection of the owner of the property: the question, therefore, is purely one of form, which, if successful, would be destructive of the real merits of the case. This (although no reason for departing from any established rule) may properly be taken into consideration, if the case do not fall within the principle of decided authorities.

The first objection to the title of the Company is, that the inquisition, ascertaining the amount of the purchase-money, does not show that there was any authority under the Act for such proceeding; that is, that it does not allege that the parties had not previously

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agreed upon such amount: for the absence of an agreement for that purpose was all that the Act required to justify the warrant, and to give jurisdiction to the sheriff and jury. Now the warrant, which was referred to and annexed to the inquisition, required the sheriff to impanel and swear a jury for the purpose of inquiring, assessing, and giving a verdict for the sum of money to be paid: and by the inquisition taken in pursuance of this warrant, the jury find, assess, and give their verdict for the sum of 17,000*l.* to be paid for the purchase of the premises, by the said Act of Parliament authorized to be taken by the said Company; and the sheriff thereupon *pronounces and gives judgment for such purchase-money, according to the directions of the Act. It certainly does not in terms negative the fact of the parties having previously agreed upon the amount of the purchase-money, but it states that which is utterly inconsistent with any such fact. If the amount of the purchase-money had been previously agreed upon, the jury could not have assessed, and the sheriff could not have adjudged, the amount of such purchase-money. Whatever form might have been gone through, the amount of purchase-money would have been that which had been adjudicated upon. It will not be found, upon an examination of the cases, that any inquisition had been held defective for not alleging a fact necessarily implied from those which are alleged; and if that be so, there cannot be any ground for doing so for the first time in the present instance. This was the ground upon which the Judges in the Exchequer Chamber held the proceeding to be free from objection upon this point, and which was before them, and now is sufficient to dispose of the first objection raised. Had this not been so, it would have been proper to consider whether it can be necessary in any case that there should be, on the proceedings, averments of facts, into which the parties had no authority to inquire; and of which therefore they could have no judicial knowledge.

I will now shortly examine the cases which have been relied upon, as applicable to these points. In *Rex v. Manning* (1), the notice stated was not that which the Act required, but the judgment proceeded upon other objections. In *Rex v. The Mayor of Liverpool* (2), the notice was to be given by the sheriff; and as none was stated, the inquisition was quashed. In **Rex v. Bagshaw* (3), the notice was to be given by the trustees, who were to summon the

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(1) 1 Burr. 377.

(3) 7 T. R. 363.

(2) 4 Burr. 2244.

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jury and to adjudge. In *Rex v. The Inhabitants of Hulcott* (1), an order of justices discharging a servant from her service was held bad, because it did not state that she was a servant in husbandry; a fact upon which it was said their jurisdiction depended, and which it was their duty to ascertain. In *Kite v. Lane* (2), the objection was that the conviction did not show that the justices were of that district, to the justices of which alone the Act gave jurisdiction. In *Rex v. The Parish of All Saints, Southampton* (3), the jurisdiction of the magistrates to take the examination of the soldier depended, under the Mutiny Act, upon the fact of his being quartered at Southampton; a fact which they were bound to have ascertained, and which not being stated in the examination, nor proved *aliunde*, rendered the examination inadmissible in evidence. In *Day v. King* (4), the facts that the applicant was a member of a friendly society, that he was entitled to the money, and that the party against whom the application was made was an officer of the society, were held to be not only necessary to give the justices jurisdiction, but formed part of what they had to decide; and yet these facts were not stated in the order, which was therefore deficient. In *Rex v. The Trustees of the Norwich Road* (5), the inquisition was to be taken before the trustees, who were the parties to give the notice, and the judgment was not upon that point. In *Doe d. Payne v. The Bristol Railway Company* (6), the inquisition did state the notice to *treat, and the neglect to do so; the only point decided affecting the case was, that whatever was made necessary by proviso need not be stated; which may be material as to another part of this case. In *Reg. v. The Committee-men of the South Holland Drainage* (7), the decision did not turn upon the words of the statement as to a notice to treat; the Court being of opinion that the party was estopped from taking this objection. Lord DENMAN, indeed, intimated an opinion that such notice to treat ought to have been stated, for the purpose of showing jurisdiction. It is, however, to be observed, that the trustees who were to hold the inquisition, were also the parties to give the notice; in stating it, therefore, they would not be stating the acts of others, of which they had no judicial knowledge. In *Reg. v. The Trustees of Swansea Harbour* (8), the facts were precisely the same as in the present case: the inquisition was silent as to any

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(1) 6 T. R. 553.

(2) 1 B. & C. 100.

(3) 31 R. R. 296 (1 Man. & Ry. 663; 7 B. & C. 785).

(4) 5 Ad. & El. 359; 2 Har. & Wol.

128.

(5) 5 Ad. & El. 563.

(6) 55 R. R. 632 (6 M. & W. 320).

(7) 47 R. R. 618 (8 Ad. & El. 429).

(8) 8 Ad. & El. 439.

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notice to treat, or non-agreement, the issuing of a warrant, or any of the circumstances necessary to give the jury and the Sessions jurisdiction. The objection was made, and Lord DENMAN, though he relied much upon the ground that the trustees who obtained the inquisition could not object to it, observed that he was not prepared to say that the inquisition was not good; and Mr. Justice LITLEDALE and Mr. Justice WILLIAMS held that the inquiry stated in the inquisition assumed the disagreement, and that that was sufficient. The opinion of Lord DENMAN, that he was not prepared to say that the inquisition was not good, is the more important, because it fell from him after the case had been before him upon an application for a *certiorari*, upon which occasion he had used expressions favourable to the applicants. In *Reg. v. The *Manchester and Leeds Railway Company* (1), the decision did not touch the point. The case of *Rex v. Croke* (2) was much relied upon by the plaintiff in error. The point upon which the judgment there seems to have rested, was the error in the style of the Corporation of London. But Lord MANSFIELD suggested an objection, which had not been raised at the Bar, that the statement of the notice of the proceeding before the jury was defective. The Act did not specify by whom the notice was to be given, but I assume that it ought to have been given by the Corporation of London. It was, therefore, not an act to be performed by those who were to hold the inquisition; and if held necessary to be stated in it, would be an authority in favour of the proposition of the plaintiff in error. It does not, however, appear to have been the ground of the decision, and certainly was not the subject of argument. That case is, however, remarkable in this respect, that in that, as in this case, resort to a jury was only to be had if the parties did not agree as to the purchase; "refusal or inability to treat" being the terms used; but upon that subject the inquisition was as silent as in the present: and yet neither from the Bar nor from the Bench does any objection appear to have been suggested upon this point, which is the principal one relied upon in the present case.

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I have now examined all the cases which have been relied upon on either side, and the result appears to be, 1st, that if it be necessary that the inquisition should state the absence of an agreement between the parties, what appears upon the present inquisition was, in *Reg. v. Swansea Harbour*, decided to be sufficient, and in *Rex v. Croke* was assumed to be so, from the objection not having been

(1) 8 Ad. & El. 413.

(2) Cowp. 26.

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taken ; *2nd, That, except in what fell from Lord MANSFIELD in the latter case, and from Lord DENMAN in the case of *Reg. v. The Committee-men of the South Holland Drainage* (1), there does not appear to be any authority for holding that the inquisition or other proceeding need state any matter not cognizable by the authority whence such proceeding emanates ; and all reasoning appears to be against any such rule. The instances referred to by Lord ABINGER (2), in the Court below, prove that such preliminary matters were not cognizable by the sheriff and jury, and could not be the subject of proof before them. How, then, can it be necessary or proper that their inquisition should state facts of which they could not have received any proof, particularly when, by the 138th section of the Act, and the authority of *Basten v. Carew* (3), such statement would have been conclusive ?

It appears to me, therefore, that the first objection cannot be supported.

A second objection was raised in argument in this House, which I do not see noticed in the report of the case before the Exchequer Chamber ; and that is the want of any statement as to notice of the proceeding before the jury, as required by the 138th section. This, if not removed by the observations before made, will be answered by the case of *Doe d. Payne v. The Bristol Railway Company* (4), which decided that what was made necessary by way of proviso in the Act, need not be alleged in the proceeding ; but the want of it was to be brought forward by the objecting party. The affidavits show that no such case exists in point of fact.

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Upon the other objections I do not think it necessary to make any detailed observations, being of opinion that they are satisfactorily answered by the LORD CHIEF JUSTICE of the Court of Common Pleas, in the judgment in the Court of Exchequer Chamber ; and with respect to the objection as to the payment of the 17,000*l.* into the Bank of England, it appears to me that there was a payment in fact, and that the provisions of the Act have been sufficiently complied with.

I am, for these reasons, of opinion, that the judgment should be given for the defendants in error, with costs.

The judgment of the Court of Exchequer Chamber was accordingly

Affirmed, with costs.

(1) 47 R. R. 618 (8 Ad. & El. 429).
 (2) 2 Q. B. 999.

(3) 27 R. R. 453 (3 B. & C. 649).
 (4). 55 R. R. 632 (6 M. & W. 320).

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- (11 Clark & Finnelly, 667—683; S. C. nom. *Morrice v. Sanford*, 8 Jur. 967; varying S. C. nom. *Morrice v. Langham*, 11 Sim. 260; 10 L. J. Ch. 38; 6 Jur. 334.

Will—Shifting clause—Appointment—Intermediate rents.

T. settled his freehold estates (subject to appointment) on himself in tail, remainder to J. L. and his sons in strict settlement, remainder to L. C. for life; provided that if J. L., or any issue male of his body, should become entitled in possession to his father's family estates, then the uses before declared of T.'s estates for the benefit of him or them who should so become entitled, and for the benefit of his or their issue male, should cease, and those estates should go over as if the person or persons so becoming entitled were dead without issue male.

J. L. having afterwards become entitled in possession to his father's family estates, T. by his will appointed his said estates to J. H. L. (the eldest son of J. L.), and his sons in strict settlement, remainder to the heirs of H. H. deceased; provided, that if any tenant for life in possession under the will should become entitled in possession to J. L.'s family estates, his interest in the devised estates should cease, and those estates go over to the person next in remainder under the will, as if the tenant for life were dead. The testator devised his copyhold estates upon such trusts as would nearest correspond with the uses and trusts of his freehold estates, and then gave all the residue of his real and personal estates to S. M. and W., their and each of their heirs, executors, &c. absolutely, in equal third parts.

On the testator's death in 1824, J. H. L. entered upon his estates under the will; and in 1833, he became entitled in possession to J. L.'s family estates; and had no son. A bill was filed by the residuary legatees, claiming the rents of all the estates accruing between 1833 and J. L.'s death or his having a son, against H. H.'s heir, who claimed the same rents, and against L. C. and H. L. (second son of J. L.), who claimed, adversely to each other, the rents of the freehold estates under the limitations in the settlement, in default of appointment of them by T.:

Held by the Lords (partly affirming a decree made on that bill), that the plaintiffs were entitled to the rents of the copyhold estate, under the residuary devise; 2 (partly reversing the decree), that no adjudication could be made in the cause as to the rents of the freeholds, the question as to them being between co-defendants.

THE questions in this appeal arose on the construction of shifting clauses contained in an indenture *and in a will. By the indenture, dated the 13th of April, 1804, and by a fine and common recovery levied and suffered in pursuance thereof, the Rev. Francis Tutte conveyed certain freehold manors, together with divers farms and other hereditaments, to such uses as he should afterwards, by deed or will, appoint; and, in default of appointment, to the use of himself in tail, with the remainder to the use of James Langham, Esq., the second son of Sir James Langham, of Cottesbrooke Hall, in the county of Northampton, deceased, for his life; with remainder to the use of trustees during the life of the said James

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Feb. 22, 23,
26.
Sept. 5.
—
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Langham, to preserve contingent remainders; with remainder to the use of his first and other sons successively in tail male; with remainder to the use of the respondent, Langham Christie, for his life, with a limitation to trustees to preserve, &c.; with remainder to the use of his first and other sons successively in tail male; with remainders over, and the ultimate remainder to the use of the right heirs of Herbert Hay, deceased.

The indenture contained the following clause: "Provided always, and it is hereby agreed and declared by, &c. that in case the said James Langham, or any issue male of his body, shall become entitled to the possession or to the receipts of the rents and profits of the family estate late of the said Sir James Langham, deceased, to the amount of 1,000*l.* per annum over and above all outgoings and reprises, then and in every such case, the use, limitation and estate, uses, limitations and estates hereinbefore limited, expressed, declared, and contained of and concerning the said hereditaments and premises, to or for the benefit of him or them who shall so become *entitled to the possession or to the receipt of the rents and profits of the family estates of the said Sir James Langham, or any of them, to the amount of 1,000*l.* per annum as aforesaid, and to or for the benefit of the issue male of such person or persons so becoming entitled, shall cease, determine, and be absolutely null and void; and then and in every such case, all and singular the said hereditaments and premises shall immediately thereupon from time to time divest out of the person or persons so becoming entitled, and shall go over in such and the same manner, to all intents and purposes, as if such person or persons so becoming entitled were actually dead without issue male."

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In 1812 the said James Langham became Sir James Langham, and entered into the possession and the receipt of the rents and profits of the family estates mentioned in the indenture, to the amount of 1,000*l.* a year and upwards.

In 1820 the said F. Tutte made his will, and thereby, in pursuance of the power reserved to him by the above-stated indenture, he appointed all the said manors and other hereditaments (subject to an annuity to the respondent Mrs. Wainewright, which he afterwards revoked by a codicil) to the use of Alexander Hale Strong, since deceased, and the respondents F. E. Morrice and A. Wainewright, their heirs and assigns, upon certain trusts for raising the sum of 12,000*l.* (for which 10,000*l.* was afterwards substituted by a codicil), to be considered as part of the testator's

personal estate; and, subject thereto, he thereby directed and appointed that the said Strong, Morrice, and Wainewright, and the survivor of them, and the heirs and assigns of such survivor, should stand seised of all the said manors and other hereditaments, *To the use of James Hay Langham, the eldest son of Sir James Langham, of, &c. (this Sir James being the same person who in the indenture was mentioned as James Langham, Esq.), and his assigns for his life; with remainder to the use of John Lupton and Willoughby Rackham and their heirs, during the life of the said J. Hay Langham, upon trust, to preserve the contingent uses and estates thereafter limited; with remainder to the use of the first and other sons of the said J. Hay Langham successively in tail male; and in default of such issue, to the use of the right heirs of Herbert Hay, deceased, for ever: " Provided always, &c. that each person who, by virtue of any of the uses, limitations, and provisions herein contained, shall for the time being be tenant for life in possession of the said manors, hereditaments, and premises, or of any part thereof, and shall at the same time become entitled to the settled estates of Sir J. Langham, of, &c., so as to be in the actual receipt of the rents thereof, then and in every such case, and thenceforth, the estates and interests hereinbefore limited to every tenant for life respectively, of and in the said manors, hereditaments, and premises hereby limited, as shall become so entitled in possession to the said settled estates of the said Sir J. Langham, shall cease and determine: Provided also, &c., that every person who, according to the uses, limitations, or provisions herein contained, shall for the time being be tenant in tail in possession of the said manors, hereditaments, and premises hereinbefore limited, and shall at the same time become entitled to the said settled estates of the said Sir J. Langham, so as to be in the actual possession or in the actual receipt of the rents and *profits thereof; then and in every such case, and thenceforth, the estate tail which every such person shall by virtue of any of the trusts, limitations, or provisions be seised of or entitled to in the said manors, hereditaments, and premises hereby limited, shall cease and determine: And in either of the cases last mentioned, the said manors, messuages, lands, tenements, hereditaments, and premises hereby directed, limited, and appointed as aforesaid, shall immediately thereupon go over to the person next in remainder under the limitations aforesaid, in the same manner as the said person so next in remainder would take the same, by virtue of this my will, if the person so becoming entitled to

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the said settled estates of the said Sir J. Langham, being tenant for life, was dead, or being tenant in tail, was dead without issue male."

The testator by his said will devised his copyhold and customary estates to the said A. H. Strong, his heirs and assigns, upon such trusts, and with, under, and subject to such powers, provisoes, and limitations, and to and for such intents and purposes, as would nearest and best correspond with the uses and trusts thereinbefore limited of and concerning his manors and freehold hereditaments thereinbefore directed, appointed, and limited. He then gave some directions respecting books, pictures, and fixtures. And as to all the rest and residue of his real and personal estates, of every nature and kind whatsoever, he gave, devised, and bequeathed the same to the said Strong, Morrice, and Wainewright, and their and each of their heirs, executors, and administrators, or assigns, in equal third parts, according to the nature and quality of the same estates respectively; and he appointed them his executors.

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The testator made several codicils to his will, not affecting the matters in question in this appeal, and he died without issue in January, 1824; whereupon James Hay Langham, the first tenant for life named in the will, entered into possession or receipt of the rents and profits of the freehold and copyhold estates thereby devised. Alexander Hale Strong, one of the trustees and executors, died in the same year.

In April, 1838, Sir James Langham, in the will mentioned (and in the indenture of April, 1804, mentioned as James Langham, Esq.) died, leaving several sons, the eldest of whom, the said James Hay Langham, succeeding to the Baronetcy, became entitled to and entered into the possession or receipt of the rents and profits of "the settled estates" in the will mentioned (the same as the family estates mentioned in the indenture), exceeding 1,000*l.* per annum.

Upon that event, and inasmuch as Sir James Hay Langham had no male issue, several parties, insisting that the life estate limited to him by the will had then ceased by virtue of the proviso therein contained, claimed to be entitled to the rents and profits of the devised estates during his life or until he should have a son. All such rents and profits were claimed, during that period; 1st, by the respondents, Morrice, Wainewright and his wife, and Law and P. T. Strong (who are the representatives of A. H. Strong, deceased), by virtue of the residuary bequest in the will; 2ndly, by the appellant (then an infant), under the ultimate limitation in the will to the right heirs of Herbert Hay, the appellant being one of his

heirs, if not his sole heir; 3rdly, the respondent Langham Christie claimed to be entitled to the rents and profits of the freehold estates only, during the same period, on the ground *that, being undisposed of by the will, they belonged to him in the events that happened, under the limitations and proviso contained in the indenture of 1804, in default of any appointment by F. Tutte in exercise of the power therein reserved to him; and 4thly, the respondent Herbert Langham, who is the second son of James Langham mentioned in the indenture, claimed the last-mentioned rents during the same period, on the ground that the only uses and estates that ceased by virtue of the proviso contained in the indenture, were the life estate of the said J. Langham, and the estate tail of his eldest son J. Hay Langham; and that this respondent, as the person next in remainder, was the person who would have been entitled to the said freehold hereditaments under the limitations of the indenture, in default of appointment by F. Tutte.

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Sir J. Hay Langham having continued in possession or in receipt of the rents and profits of the devised estates notwithstanding his succession to the settled estates of Sir J. Langham, the three first-named respondents filed their bill in Chancery in 1836 (afterwards amended) against him and all the other respondents, and against the appellant and others.

After various proceedings in the cause, the VICE-CHANCELLOR made a decree on the 16th November, 1840, by which he declared, among other things, that, according to the true construction of the testator's will, the rents and profits of his copyhold estates, as from the 14th of April, 1833, the time when Sir J. Hay Langham became entitled to the settled estates of Sir J. Langham, so as to be in the actual receipt of the rents thereof, to the time of the decease of the said *Sir J. Hay Langham, or until he should have male issue, passed by the residuary devise in the will to A. H. Strong, F. E. Morrice, and Arnold Wainewright, in equal third parts, in manner and according to the directions and trusts of the will. And his Honour declared, that the rents and profits of the freehold estates in question, accrued and to accrue during the same period or any part thereof, were not disposed of by the said will, and that the same belonged to the person or persons who would have been entitled to such estates under the indenture of the 12th of April, 1804, in default of any appointment by F. Tutte in exercise of the power therein contained. And the decree—after directing the Master to take certain accounts and make inquiries therein specified, which

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are not material to be here stated—ordered that a case be made for the opinions of the Barons of the Court of Exchequer; and that the questions in such case should be, whether under the limitations and proviso contained in the said indenture, supposing no appointment to have been made by F. Tutte in exercise of the power therein contained, the defendant Herbert Langham was entitled to any and what estate in the freehold hereditaments comprised in the indenture; and whether the defendant Langham Christie was entitled to any and what estate in the said freehold hereditaments. And the decree reserved all further directions until after the said Barons should have made their certificate (1).

The appeal was brought against so much of the decree as is above stated.

[675] *Mr. James Russell and Mr. Hodgson, for the appellant.* * * *

[678] *Mr. Wigram, for the respondent Langham Christie, submitted that this respondent was, in the events which happened, entitled, under the limitations of the deed, to the rents of the freehold estates not appointed by the will: that the estate thereby limited to the right heirs of Herbert Hay, was limited to take effect after the estates limited to the first and other sons of J. H. Langham in tail male, and could not take effect in possession until after his death and failure of his issue male: that the appellant, claiming as heir of Herbert Hay, could not by law be entitled to the rents and profits of the devised freehold and copyhold hereditaments accruing before the estate limited to the right heirs of Herbert Hay had taken effect in possession: that the effect of the proviso was not to create any new limitations, but, by removing the life estate of J. H. Langham, to let in the other limitations; but that*

[*679] *acceleration was the true operation of *the proviso, neither complicating the construction by raising springing uses, nor carrying the estate beyond the next taker.* * * *

Lord COTTENHAM directed the attention of counsel to the form of the pleadings. The principal question in the appeal is between co-defendants in the Court below; and the ordinary course there would be, when the plaintiffs failed in making out a title to the rents of the freehold estates, to dismiss their bill *quoad* those estates.

(1) The Barons certified that Herbert Langham was not entitled to any estate in the hereditaments, but that Langham Christie was entitled to an estate for life in them: 8 M. & W. 194.

LORD BROUGHAM :

The plaintiffs were out of Court by the declaration of the VICE-CHANCELLOR as to the freehold estates ; and if the House should affirm his decree as to them, it would be affirming a decree between co-defendants.

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Mr. Bethell, for the respondent Morrice and the other residuary legatees (plaintiffs below), said the decree declared them entitled to the rents of the copyhold estates under the residuary devise in the will.

LORD COTTENHAM :

The decree may be right as to the copyholds, nor do I say the declaration as to the freeholds is wrong ; but is there any case stated on the pleadings to justify the Court in making a declaration as to the freehold rents ? The suit, as it *appears to me, went on between co-defendants on a point in which the plaintiffs had no interest under the decree. The better course is for counsel to examine the pleadings, to see if they are in a state to bring properly before the House the question of title to those rents.

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Mr. Bethell, after submitting that the decree was complete enough for their Lordships' adjudication, proceeded to support it, confining his argument to the claim of his clients to the rents of the copyhold estates. * * *

No counsel appeared for Herbert Langham.

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Mr. Hodgson, in reply. * * *

LORD COTTENHAM :

Sept. 5.

The difficulty which I suggested during the hearing of this case at the Bar has not received, in my opinion, any satisfactory answer. It was this : that the issue with regard to the freeholds arose entirely between co-defendants ; and that if so, it was not only not the habit of a court of equity, but was not consistent with its principles, to adjudicate between co-defendants. But as to the copyholds, that was not the case, because there had been an *adjudication as regards the plaintiffs' interest, so far as they claimed any interest in the copyholds. Now the judgment of the VICE-CHANCELLOR was quite correct as to the copyholds, in my

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opinion ; and I believe that is the opinion of the noble and learned Lords who with me attended the argument. So far, therefore, as relates to the copyholds, I should advise your Lordships to affirm the judgment of the Court below. But inasmuch as we are of opinion that, as regards the freeholds, the Court below proceeded erroneously in adjudicating between co-defendants, the proper course to be adopted would be to reverse the decree so far as relates to the freeholds, not upon the merits, but because the question, as it is stated in the decree, arose between co-defendants ; and then it may be necessary to make a reservation, in order to enable the defendants to set themselves right in the form of the suit ; because in that view of the case, the bill ought to have been dismissed at the hearing, *quoad* the freeholds ; and if the parties think it worth while to come here again for the purpose of having the decree set right in that respect, they possibly may be entitled to do so.

The order I should propose would be, to affirm the decree so far as it relates to the copyhold property, and to reverse it so far as it relates to the freehold, upon the ground of its being a question between co-defendants ; with liberty to the parties to present another appeal upon any question arising between them and the plaintiffs *quoad* the freeholds. If the counsel have anything to suggest against that order, I shall be glad to hear it now, not on the merits, but on the form.

* * * * *

[683] The following order was made, viz. :

It was ordered, that the said decree, so far as it related to the rents and profits of the copyhold estates in question, be affirmed : And it was further ordered that the said decree, so far as it related to the rents and profits of the freehold estates in question, and to the directions touching them, be reversed, on the ground of the same being upon matters in question between co-defendants in the Court below : And it was further ordered that the appellant do pay to the plaintiffs in the Court below, and to the said respondents Geo. Law and P. T. Strong, their costs of the appeal, so far as it related to the copyhold estates : And it was also further ordered that the appellant or respondent Langham Christie be at liberty to present another appeal upon any question arising between them respectively, and the said complainants, as to the said freehold estates.

ELIZABETH METFORD CHARTER(1) AND THOMAS
PATTON *v.* SIR JOHN TREVELYAN AND OTHERS.

(11 *Clark & Finnely*, 714—741; S. C. 8 *Jur.* 1015; affirming 4 *L. J. (N. S.)*
Ch. 209.)

Fraud—Solicitor and client—Purchase—Lapse of time—Arbitration—
Practice; bill of review.

A. was the solicitor and land agent of B., who was desirous of selling an estate, and in a letter to A. expressed his readiness to sell it for 13,000 guineas. The estate consisted of two portions, and a land-valuer (whose valuation was not shown to have been communicated by A. to B.) put upon the two portions separate values which, added together, exceeded the 13,000 guineas. A. sold part of the estate to C. for a sum exceeding the valuer's estimate of that portion, and then purchased the other portion for a sum much less than that stated in the estimate, but which, added to C.'s purchase-money, just made up 13,000 guineas. A. pretended that the latter purchase was made by one of his relatives, and the conveyance from B. was executed to that relative, but immediately afterwards a conveyance was executed from the relative to A., and in that conveyance was a recital that the purchase-money was furnished by A. These facts were not discovered till 37 years afterwards, and then B. filed his bill against the representatives of A. (who had died 17 years before), to set aside the latter conveyances, and to have an account:

Held, that the circumstances of the transaction were of a fraudulent nature, and therefore furnished an answer to the objection arising upon the length of time during which the transaction had remained unimpeached.

Held also, that the bill was sustainable, though disputes which had arisen between A. and B., as to their mutual accounts, had been referred in A.'s lifetime to a barrister, who was empowered to inquire into all matters of difference between them; and who, after awarding the payment of a certain sum by A. to B., had directed the execution of mutual releases of all matters in difference; and the releases had been executed.

A petition for a bill of review was presented, on the ground of a discovery made (soon after the decree in the cause) that some copies of papers therein put in evidence were not in conformity with the originals:

Held, that as these papers could not of themselves have led to a different result, the petition for leave to file a bill of review had been rightly dismissed.

THIS was a suit to set aside a conveyance of the manor of Seaton, and other property at Seaton, in the *county of Devon, which had, in the year 1788, been obtained from the late Sir John Trevelyan, baronet, the father of the respondent, by his steward, the late Mr. Thomas Charter, under whom the appellants claim.

The late Sir John Trevelyan was, in the year 1770, possessed of very considerable estates in the counties of Devon and Somerset, and among others of the said estate at Seaton in the former county: which estate consisted of the manor or lordship of Seaton, with a sea-beach and other manorial rights belonging to the manor;

(1) This appellant died after the the name of William Metford, her appeal was argued; it was revived in executor.

1842.
April 14, 21,
22, 25, 26,
28, 29.
May 5, 30.
June 2.
1844.
Sept. 5.
—
Lord
LYNDHURST,
L.C.
Lord
COTTENHAM.
Lord
CAMPBELL.
[714]

[*715]

CHARTER of a manor-house and demesne lands, and of a great number of
 TREVELYAN. dwelling-houses, lands and hereditaments, which were let on leases for lives of various ages, on small conventional or chief rents.

Mr. Thomas Charter, who was an attorney residing and practising at Bishop's Lydeard, in the county of Somerset, was the steward and receiver of rents for those estates; and Sir John Trevelyan, who resided principally in London, left to him the whole management of them. Thomas Charter was also employed by Sir John Trevelyan as his solicitor and confidential agent in many other matters during the same period; and he had, by these means, prior to the year 1785, become possessed of the trust and confidence of Sir John Trevelyan to a very great degree.

[*716] In 1785, Sir John Trevelyan became desirous of selling the Seaton estate; and with his approbation, Thomas Charter employed Mr. Samuel Kingdon, of Milverton, in the county of Somerset, a land-surveyor and valuer of great experience, to make a valuation of all the portions of that estate. Mr. Kingdon accordingly surveyed them, and made a written valuation *thereof, which he delivered to Thomas Charter, as the agent of Sir John Trevelyan. The valuation, which was intitled "An estimate of the value of the manor of Seaton, in the county of Devon, the property of Sir John Trevelyan, baronet," contained, first a valuation of the demesnes; secondly, a valuation of the lands out on lease, therein described as leaseholds, and it gave the gross yearly value, the particulars of all the outgoings, the clear yearly value and the value in fee to sell, so as to give to the purchaser $3\frac{1}{2}$ per cent. on his money. The demesne lands were put down at a sum of 13,184*l.*, and the reversions were estimated at 4,790*l.* 13*s.*; but Mr. Kingdon added that if the houses were sold to the lessees separately, they might fetch considerably more than the sum he had put upon them.

The valuation did not include the manor-house and garden, the sea-beach, and other manorial rights belonging to the manor.

In the course of the years 1786 and 1787, Thomas Charter sold for Sir John Trevelyan the reversions of several lands and tenements at Seaton, part of the lands held on leases for lives included in the valuation. They were sold to different persons for various sums, amounting together to 1,284*l.* The value put upon these reversions by the valuation, so as to give the purchaser $3\frac{1}{2}$ per cent., was 1,265*l.* 12*s.* The sums produced by these sales appeared by an account in the handwriting of Thomas Charter.

In the year 1787, Thomas Charter, on behalf of Sir John Trevelyan, entered into a treaty first with Sir John Pole, and afterwards with a Mr. Maurice Lloyd, for the sale of the Seaton property, for the sum of 18,650*l*. Neither of these gentlemen became the purchaser; *and on the 15th of April, 1788, Sir J. Trevelyan wrote to Thomas Charter that he should have no objection to receive 18,000 guineas for Seaton at any time, and the sooner the better, as he knew how to apply the money.

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In May, 1788, after the treaty with Maurice Lloyd had been put an end to, Thomas Charter, on behalf of Sir John Trevelyan, agreed with the trustees of Sir Thomas Acland, baronet, to sell to them the whole of the demesne lands of the manor of Seaton then remaining unsold, for the sum of 12,500*l*. This agreement was afterwards varied, by reserving out of the demesne lands 13½ acres, hereinafter called the excepted demesnes; and for the purpose of fixing the deduction which was to be made from the said purchase-money, in respect of the excepted demesnes, Mr. Kingdon was employed to put a value upon the latter. Mr. Kingdon accordingly made that valuation, and fixed the sum of 425*l*. 14*s*. as the value in fee, so as to give the purchaser 3½ per cent. for his purchase-money. Thomas Charter made alterations in this valuation, which increased the value to 476*l*. 5*s*. That sum, as the value of the excepted demesnes, was accordingly deducted from the purchase-money agreed to be paid by Sir Thomas Acland's trustees, and their purchase-money was thereby reduced to the sum of 12,029*l*. 15*s*.; and the sale to them was concluded at that price, and was carried into effect by deeds of conveyance dated the 24th and 25th March, 1788.

The whole of this treaty with the said trustees was carried on and settled by Thomas Charter, without the intervention of Sir John Trevelyan.

After the sale to Sir Thomas Acland's trustees, Thomas Charter reported to Sir J. Trevelyan that he had also sold to a Mr. James Charter, of Exeter, *(who was a cousin of Thomas Charter), all the remaining reversions at Seaton belonging to Sir John Trevelyan, for a sum which, with the money to be paid by Sir Thomas Acland's trustees for the property purchased by them, would make up 18,650*l*., the price which had been previously offered by Mr. Lloyd; and Sir John Trevelyan executed indentures dated the 1st and 2nd May, 1788, being a conveyance to James Charter of the property said to be purchased by him (and to

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set aside which was the principal object of the suit). These deeds were prepared by Thomas Charter, and he was one of the attesting witnesses to them.

Indentures of lease and release, dated 1st and 2nd June, 1788, and made between James Charter of the one part, and Thomas Charter of the other part, were executed by James Charter; and by the latter deed, after reciting the conveyance to James Charter by the said deeds of the 1st and 2nd May, 1788, and reciting that the purchase-money or consideration mentioned in such deeds was the proper money of Thomas Charter, and that the name of James Charter was made use of in the said conveyance upon trust only for Thomas Charter, his heirs and assigns, and that Thomas Charter had requested James Charter to convey the said manor or lordship, hereditaments and premises, to him Thomas Charter, his heirs and assigns, he, James Charter, for the nominal consideration of 5s., conveyed and assured unto and to the use of Thomas Charter, his heirs and assigns, all the premises comprised in the indenture of the 2nd May, 1788, and thereby conveyed and assured by the said Sir John Trevelyan to him the said James Charter, with their appurtenances.

[*719] This conveyance from James Charter to Thomas Charter was wholly concealed from Sir John Trevelyan; *as was the fact that Thomas Charter, and not James Charter, had been the real purchaser of the property.

Thomas Charter ceased to act as the solicitor and steward of Sir John Trevelyan in the year 1806; and disputes arose between them, which were finally referred to arbitration. In the course of the proceedings under the reference, in which the arbitrator was to arbitrate on all "actions, causes of action, suits, controversies, claims, and demands" between the parties, certain queries to be put to Thomas Charter, prepared by Mr. Boucher, who acted as solicitor to Sir John Trevelyan, were used. Among them was the following: "What were the last reversions of the leaseholds in Seaton sold for; and to whom was the purchase-money paid?"

Thomas Charter gave the following answer in writing: "The last reversions were sold and conveyed to Mr. Charter, of Exeter, for 1,626*l.* 5*s.*; and went in discharge of 1,668*l.* 15*s.*, principal and interest, on mortgage of Middleton to Harding and Glubb, as executors of Mr. Rogers, of Pilton."

Mr. Boucher having, in the course of the reference, written a letter to Thomas Charter, in which he required him to produce

before the arbitrator, among other documents, “all the rentals and last surveys, and likewise the contract for Seaton,” Thomas Charter, at a meeting before the arbitrator, which was held at Wells on or about the 20th January, 1808, produced the contract with Mr. Lloyd, mentioned in the previous part of this statement, altered in its date to 18th March, 1788, and altered so as to be a contract with James Charter, of Exeter, for the sale to him, James Charter, of the manor of Seaton, and all the lands within it not sold and conveyed to other persons, and *purporting to have been signed by James Charter, and with the following indorsement upon it, in the handwriting of Thomas Charter :

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“Contract for Seaton, drawn for Mr. Lloyd, of Dillington ; consideration money, 13,650*l*.

“Mr. Lloyd refused to sign the contract, without Sir John Trevelyan would first allow him 46*l*. 14*s*. out of the purchase-money above mentioned, for the reversion of a field called Foxhole, which was included in Mr. Kingdon’s estimate, but had been sold afterwards and not struck out, and therefore Sir John agreed to allow it ; but after that, Mr. Lloyd required a further reduction of 200*l*. for the repairs of the sea-bank, which Sir John refusing to make, the treaty broke off, and Sir John afterwards received the full purchase-money of 13,650*l*. for it, without the deduction of the 46*l*. 14*s*., as under :

	£	s.	d.
“ Of Sir Thomas Acland’s trustees - -	12,023	15	0
Of Mr. Charter - - - - -	1,626	5	0
	<hr/>		
	£13,650	0	0
	<hr/>		

“Sir Thomas Acland’s money was paid by a draft on Hoares, and Mr. Charter’s money to Child, and went to the discharge of 1,668*l*. 15*s*., principal and interest, due on the mortgage of Middleton to Harding and Glubb, executors of Mr. Rogers.”

Thomas Charter also, on the occasion of the reference, delivered to Mr. Boucher some time in the year 1808, an account, which was wholly in the handwriting of Thomas Charter, intitled, “A particular of the estates belonging to Sir John Trevelyan, baronet, in Devon and Cornwall, sold in the years 1785 and 1786 ; with an account of the purchase-money *for each estate, and how applied.” Among the items on the debtor side of this account, are the following : “Manor of Seaton, in two lots, to different people: Lands in

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CHARTER demesne, 12,028*l.* 15*s.*; reversions of tenements out on lease,
 TREVELYAN. 1,626*l.* 5*s.*”

And on the other side of this account, among other items, is the following: “Mr. Charter also received the purchase-money for the last reversions of Seaton, towards discharging the principal and interest monies due on the mortgage of Middleton, for which it was applied, 1,626*l.* 5*s.*”

The only question discussed before the arbitrator was the amount of the balance due upon the accounts between the parties; and by his award he directed the sum of 1,147*l.* 9*s.* to be paid by Thomas Charter to Sir John Trevelyan, and mutual releases to be executed “of all actions, causes of action, controversies, claims, and demands” between them. Releases were accordingly executed in the manner directed by the award.

Thomas Charter died in 1810. Thomas Malet Charter, his executor, and also his heir-at-law, upon his death took possession of all his real estate.

In 1814, and again in 1824, T. Malet Charter was called upon by Sir J. Trevelyan to deliver up some old papers; but no further communication took place between them till the 3rd of December, 1825, when Mr. Nicholas Broadmead, the solicitor of Thomas Malet Charter, sent to Mr. White, the solicitor of Sir John Trevelyan, the following letter:

[*722] “DEAR SIR,—The manor of Seaton and certain lands in that parish formerly belonged to Sir John Trevelyan, who sold them to Sir Thomas Acland, of whom they were purchased by the late Mr. Charter: Mr. Charter of Lynchfield, his son, has commissioned *me to apply to you for an attested copy of a surrender, which by his father's books appears to have been made by Sir John's mother to him, in the year 1784, of the above property. Mr. Charter has attested copies of the other title-deeds, and wishes particularly to have one of this; and expedition being an object, you will confer an obligation both on him and myself by doing it immediately, and your fees for a journey to Nettlecombe, if necessary, and the attested copy, will be paid with pleasure.”

The statement in this letter, that Sir John Trevelyan had sold the manor and other lands in Seaton to Sir Thomas Acland, of whom they were purchased by the late Mr. Charter, being contrary to the representations which had always been made by Thomas Charter to Sir John Trevelyan that this property had been sold to

Mr. James Charter of Exeter, led to an investigation of the matter by the solicitor of Sir John Trevelyan; the result of which was, that Sir John was satisfied that a fraud had been practised on him by Thomas Charter, in the sale of the property.

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On the 4th of July, 1827, Sir John Trevelyan filed his original bill in Chancery against Thomas Malet Charter, praying that he, T. M. Charter, might be decreed to deliver up to Sir J. Trevelyan all title-deeds, &c. relating to the estates of Sir J. Trevelyan, and then in the custody of T. M. Charter, or of any other person for his use; and that it might be declared, that under the circumstances therein mentioned, the sale of the said premises at Seaton was fraudulent, that T. M. Charter might be ordered to reconvey the same to Sir J. Trevelyan, and to account for the rents and profits thereof since the sale of the same.

In April, 1828, Sir John Trevelyan (before T. M. Charter had put in his answer) died, having made his will, whereby he made the respondent, who was his heir-at-law, his residuary devisee and his executor.

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In June, 1828, the respondent filed his bill of revivor against T. M. Charter: and on the 16th of September, 1831, T. M. Charter put in his answer; but other circumstances having in the meantime and by the answer been discovered by the respondent, he filed an amended and supplemental bill on the 4th of May, 1832, introducing the necessary allegations and charges, but concluding with the same prayer as in the original bill.

On the 3rd of November, 1832, T. M. Charter filed his answer to the amended and supplemental bill.

The cause came on for hearing before Sir C. C. Pepys, Master of the Rolls, on the 27th, 28th, and 29th days of January, 1835. On the 2nd of June, 1835, his Honour pronounced a decree in conformity with the prayer of the bill.

On the 4th of January, 1836, T. M. Charter died; and the directions of the decree not having been complied with, the respondent filed his bill of revivor against the representatives of T. M. Charter, and on the 13th July, 1837, the MASTER OF THE ROLLS made a decree directing the former decree to be carried into effect.

On the 19th of December, 1839, the appellants presented a petition for leave to file a bill of review, alleging the discovery of various matters which showed that the original decree was made in mistake of the real facts of the case; and among other things,

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alleging that the answer of Thomas Charter to one *of the queries put by Mr. Boucher was not that "the last reversions were sold and conveyed to Mr. Charter of Exeter," but that "the last reversions were sold to Mr. Charter," and that the other words had been by some error introduced into the copy; which they submitted, proved that Thomas Charter had not untruly represented the sale to have taken place to his cousin James, when in fact it took place to himself. The petition came on to be heard before the MASTER OF THE ROLLS on the 21st of January, 1840, when his Lordship ordered it to be dismissed with costs.

The present appeal is against the decrees made in the original and supplemental and revived suits, and against the order made on the petition for leave to file a bill of review.

Sir T. Wilde and Mr. Swanston (Mr. Goldsmid was with them),
for the appellants :

[725] The principles of equity have not been observed in this case. Nothing but wilful fraud on the part of Thomas Charter could justify the Court in opening up a transaction which had been settled so long ago as 1788; nor would the existence of fraud be sufficient for such a purpose, if the party seeking to set aside the transaction had the means of knowing the nature of the circumstances, and had delayed for an unreasonable time to act upon that knowledge : *Gregory v. Gregory* (1). * * The arbitration was a bar to the right of the party to proceed with his bill in equity. * *

[726] It is highly probable that had the transaction been questioned, even after the lapse of 20 years, while the original parties were alive, that which may now appear to require some explanation, could have been fully explained. That principle was stated even in *Randall v. Errington* (2), though there the purchase was set aside; and it was distinctly adopted and acted on in *Champion v. Rigby* (3), where, after a delay of 18 years had taken place, a bill filed by the client against his solicitor, to avoid a purchase made by the latter, was dismissed. * * *

[727] Sir J. Trevelyan got the sum which he himself put upon the estate, and his solicitor was entitled to sell it at that price. If the sale, at that price, had been made to any other person, there would not have been even a pretence for questioning the transaction.

(1) 14 R. R. 244; 23 R. R. 167
(G. Coop. 201; 1 Jac. 631).

(3) 31 R. R. 107 (1 Russ. & My.
539; Tamlyn, 421).

(2) 8 R. R. 18 (10 Ves. 423).

There is nothing beyond a mere pretence here ; a pretence founded on a rule of equity the authority of which is not disputed, but which is not applicable to the circumstances of this case. The bill ought to have been dismissed ; and the decree which sustained it is erroneous, and ought to be reversed. * * *

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The *Solicitor-General* and *Mr. Pemberton*, for the respondent :

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The principles applicable to a case of this kind are well settled by many authorities. An attorney or agent may contract with his client, but he must do so subject to the burden of proving that, in entering into the contract, he did not take advantage of his situation to benefit himself at the expense of his client : *Montesquieu v. Sandys* (1), *Bulkley v. Wilford* (2), and *Carter v. Palmer* (3). That was not shown here ; it could not be shown ; for the facts distinctly proved that Thomas Charter had taken advantage of his situation to benefit himself at the expense of his client. In the first place, there was no distinct proof that he had made Sir J. Trevelyan acquainted with the valuation put upon the property by Mr. Kingdon. * * Here Sir T. Acland's trustees gave more for the part they purchased than Mr. Kingdon's valuation had put upon it ; and Thomas Charter, taking advantage of that circumstance, purchased the remainder for himself, not at the fair and proper price, not at the price put upon it in the valuation, but only at such a sum as, with the trustees' money, would make up the amount for which Sir J. Trevelyan had said that he would sell the whole estate. Was not this fraudulently taking advantage of his situation, to benefit himself at his client's expense ? But beyond this, it is clear that he included, under the sale of the reversions, property that did not fairly come under that denomination ; and thus got a double benefit to himself at the expense of his client. And then, again, the sale was pretended to be made to a third person, when he himself was the real purchaser. To cover this fraud, double sets of deeds were prepared by Thomas Charter ; the first from Sir J. Trevelyan to J. Charter ; the others (in which the fraud in the first was distinctly avowed), from J. Charter to himself. The original decree was fully justified by the circumstances of the case, and must be affirmed. * * *

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THE LORD CHANCELLOR :

Sept. 5.

My Lords, the charge in this case is, that Thomas Charter, being

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(1) 11 B. R. 197 (18 Ves. 302).

(3) 54 R. R. 145 (8 Cl. & Fin. 657).

(2) 37 B. R. 39 (2 Cl. & Fin. 102).

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employed by Sir John Trevelyan to sell his estate at Seaton, purchased a part of it on his own account, without the knowledge of his employer, in the name of a relation, James Charter of Exeter; and that this purchase was made at considerably less than its real value.

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The property consisted of demesne lands in fee, of leaseholds for lives, of a manor-house, of certain manorial rights, and of a piece of marsh land called Axmouth Marsh. There was some difficulty in finding a purchaser. An offer had been made by Mr. Lloyd, and an agreement prepared by Thomas Charter for the sale to him of the property for 13,650*l*. This treaty, which seems to have been a mere speculation on the part of Lloyd, was afterwards put an end to. *The property had been valued by Mr. Kingdon, a surveyor, at the desire of Sir John Trevelyan. The demesne lands were estimated by him at 13,184*l*.; the reversions at 4,790*l*.; total, 17,974*l*. In this valuation the interest of money was taken at 3½ per cent. It does not seem clear that the valuation was ever seen by Sir John Trevelyan. It remained with Mr. Thomas Charter, and was produced from among his papers after his death. Sir John Trevelyan was quite satisfied to part with the property for the sum offered by Mr. Lloyd, and so expressed himself in a letter addressed to Mr. Charter. An agreement was made by Charter with James Charter of Exeter, his cousin, in pursuance of which the latter signed an agreement for the purchase of the whole of this property at the sum offered by Mr. Lloyd, viz. 13,650*l*. It was in fact the same agreement which had been prepared for Mr. Lloyd, with some alterations substituting the name of James Charter for that of Maurice Lloyd.

About the same time Charter agreed with Sir Thomas Acland's trustees for the sale to them of a part of the property, viz. the demesne lands, for the sum of 12,500*l*. Some small parcels, amounting to 13½ acres, were afterwards, by Thomas Charter's desire, excepted out of this purchase. The value of these excepted demesnes was estimated by Mr. Kingdon at 425*l*. 14*s*., which was afterwards increased by Mr. Charter to 477*l*. This sum was deducted from the amount agreed by the trustees to be paid for their purchase, and the corresponding portion of the demesnes was excepted from the conveyance.

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The whole of this arrangement with the trustees was conducted by Mr. Charter, without any interference *on the part of Sir John Trevelyan, who appears not to have been aware that any negotiation

with the trustees was depending. Conveyances were afterwards executed to the trustees and to James Charter. The conveyance to James Charter was generally of all the manor of Seaton, except such parts as had already been sold and conveyed by Sir John Trevelyan to different persons. In the following month, the property so conveyed to James Charter was by him conveyed to Thomas Charter; the deed of conveyance stating that the purchase-money was Thomas Charter's, and that James Charter purchased as a trustee for him.

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This, then, is the case of a purchase, on his own account, by an agent entrusted to sell; and the questions to be considered are, Whether this transaction was concealed from his principal? Whether the purchase was made at an undervalue? And lastly, whether the time that has elapsed since this transaction took place, is a bar to the suit?

Where an agent employed to sell becomes himself the purchaser, he must show that this was with the knowledge and consent of his employer, or that the price paid was the full value of the property so purchased; and this must be shown with the utmost clearness, and beyond all reasonable doubt. As to the first requisite, so far from its being established that the purchase was made by Thomas Charter with the consent or knowledge of Sir John Trevelyan, the evidence tends strongly the other way. It appears by the correspondence, that after the treaty with Lloyd was broken off, some suggestion was made by Thomas Charter as to the selling a part or the whole of the leaseholds, so as to make up, with the sale of the rest of the property, the sum which was to have *been paid by Lloyd. Charter appears to have gone to Exeter for this purpose. Soon afterwards Sir John Trevelyan, in answer to a letter from his agent, stated that he had no objection to receive the 13,000 guineas for Seaton at any time, and the sooner the better; and again, in another letter, written three days afterwards, he asks whether Charter's cousin would advance any money, as "concerted," he says, "between you and myself." These letters are dated 10th, 13th, and 18th of April, and lead to the inference that James Charter of Exeter was in some way to be interested in the purchase of this property, and, as it would seem, in the purchase of the leaseholds.

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About the same time a treaty was going on between the trustees of Sir Thomas Acland and Thomas Charter, for the purchase of the demesnes. This was not communicated to Sir J. Trevelyan till it

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was completed, or upon the point of being so. He discovered it by accident, and complained that it had been concealed from him. In the result, Sir Thomas Acland's trustees became the purchasers of the demesne lands, with the exception of the small portion already mentioned, amounting to about $13\frac{1}{2}$ acres, at the price of 12,023*l*. And the rest of the property, under the general description of "all that manor or lordship of Seaton, except such parts and parcels thereof, in possession or reversion, which have been already sold and conveyed to different persons by Sir John Trevelyan," was conveyed to James Charter, for the sum of 1,627*l*.; making up, with the 12,023*l*., the 13,000 guineas for which, in the letter of the 15th of April, Sir John Trevelyan said he was willing to sell the property.

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Up to this period Sir John Trevelyan had no reason to suppose, from anything that appears in the transaction, that James Charter was not the real *purchaser. The whole affair had been entirely conducted by Thomas Charter, in whom he appears to have placed entire confidence.

It is contended on the part of the appellants, that Sir John Trevelyan must have known that Thomas Charter was the purchaser, from the circumstance that some members of his family had visited Seaton; that Mrs. Trevelyan and her husband had resided for some time in the manor-house, which had been rebuilt by Thomas Charter; that Edward Trevelyan had sported over the manor with Thomas Charter's permission; and that these facts must have come to the knowledge of Sir John Trevelyan. But I think no safe inference can be drawn from these circumstances. The visits did not take place, as I collect from the evidence, till several years after the sale. Sir John Trevelyan lived at a distance; and if he continued to take any interest in the property, there was nothing to lead him to suppose that Thomas Charter might not have been acting as agent for James Charter with respect to it, or that he might not have become a purchaser or a part purchaser of it from him. As to the Court of the manor being held in Thomas Charter's name, it does not appear that this was known to Sir John Trevelyan.

Another circumstance relied upon by the appellants is the arbitration in the year 1808, with what occurred upon that occasion; but this part of the evidence leads, I think, to the conclusion that James Charter was still represented as the purchaser. In one of the documents before the arbitrators, Mr. Charter states that he

received the sum of 1,626*l.* 5*s.* 8*d.*, the purchase-money of the last reversions at Seaton, towards discharging the principal and interest due on a mortgage; for which purpose it was applied. In *another document, produced by Thomas Charter, it is stated that Sir John received the full purchase-money for Seaton, 13,650*l.*, as under :

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	£	s.
"Of Sir Thomas Acland's trustees - - -	12,023	15
Of James Charter - - - - -	1,626	5
	<u>£13,650</u>	<u>0"</u>

The third document purported to be an answer to certain queries put to Mr. Charter, on the part of Sir John Trevelyan. One of those queries was in these words: "What were the last reversions in Seaton sold for, and to whom was the purchase-money paid?" The answer given was, that the last reversions were sold and conveyed to Mr. Charter of Exeter, for 1,626*l.* 5*s.* It was objected that this document, which purported to be a copy of queries and answers, was not admissible in evidence; but in the paper of admissions signed by the solicitors, it was agreed to admit, on the part of the defendant, that this document had been produced for Sir John Trevelyan before the arbitrator on the reference. It does not appear from the report that any objection was taken before the Master of the Rolls to this evidence. The document was produced upon the arbitration, and it must of course have been seen on that occasion by Thomas Charter. It is not suggested that any objection was made by him to its accuracy. It is equivalent to an assertion, in Thomas Charter's presence, that he had stated James Charter to be the purchaser; and as such it is, I think, admissible.

The circumstances to which I have adverted lead me to the conclusion that at the time of the reference, viz. in the year 1808, Sir John Trevelyan was unacquainted *with the fact that James Charter was not the purchaser. [*736]

On the motion for leave to file a bill of review, a document was produced in the handwriting of Thomas Malet Charter, who was clerk to his father, and which was stated to contain the original answer by Thomas Charter to the queries of Mr. Boucher; and from the handwriting of Boucher upon it, it is clear that it must have been seen by him. In this document Mr. Charter's name is interlined by Boucher, as the purchaser. But that is not, I think, inconsistent with Mr. James Charter being the person meant, and with his having accordingly so described him, with the addition

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of "Exeter," when he made out the paper produced before the arbitrator.

Reference was made to certain entries in Bryant's diary, for the purpose of repelling the inference to be drawn from this evidence. That book was seen and inspected by Boucher, but it was examined for a particular purpose; and even if the entries had been more distinct than they appear to be, I cannot assume that they would have arrested that gentleman's attention.

The item under date June, 1788, in the list of claims and demands, if it stood alone, might lead to the inference that Sir John Trevelyan considered Thomas Charter as the purchaser; but it is, I think, without any strained interpretation, reconcilable with the evidence relied upon by the appellants; and upon this part of the case the balance of evidence is, I think, strongly in his favour.

[*737] The next question relates to the value. The reversions, together with the $13\frac{1}{2}$ acres, the manor-house, and the manorial rights, were included in the portion of the estate purchased by Thomas Charter for 1,627*l.* *This was far below Mr. Kingdon's estimate. The estimate remained in the possession of Thomas Charter. The value of the whole property was stated by Kingdon to be, as to the demesnes, 13,184*l.*; as to the reversions, 4,790*l.* The $13\frac{1}{2}$ acres demesne excepted from the purchase by the trustees, were valued at 476*l.* 5*s.*; and the demesnes sold off before the sale to the trustees, were estimated by Kingdon at 452*l.* 10*s.* The manor-house with the appurtenances was included in the valuation of the demesnes, and is estimated by the witnesses at 420*l.* These three sums deducted from 13,184*l.*, Kingdon's valuation of the demesnes, leave a balance of 11,835*l.* 5*s.* for the demesnes purchased by Sir Thomas Acland's trustees, and which were purchased for 12,026*l.* 15*s.* The demesnes therefore sold for something more than their estimated value.

Then as to the reversions; they were valued at 4,790*l.* 13*s.* A part had been sold; that portion was sold for 1,284*l.*, a little more than the valuations. The residue purchased by Thomas Charter, in his cousin's name, would, according to the same valuation, be worth 3,506*l.* 13*s.* But in addition to the reversions, there were the $13\frac{1}{2}$ acres of land, valued at 476*l.* 5*s.*; and the manor-house and appurtenances, valued at 420*l.*; making altogether 896*l.* 5*s.*; which, added to the value of the unsold reversions, amounts to 4,402*l.* 18*s.* This property he purchased for the sum of 1,626*l.* 5*s.*, being not much more than a third of the sum at which it had been

valued by Mr. Kingdon; an under-value so great as to admit, I think, of only one explanation, viz., that finding Sir John Trevelyan was willing to sell the whole property for 13,000 guineas, and that Sir Thomas Acland's trustees were willing to pay for *their part the sum of 12,023*l.* 15*s.*, he availed himself of the opportunity of getting the residue for the sum required to make up the 13,000 guineas, without regard to the actual value, thinking that Sir John Trevelyan would be satisfied with realizing that sum, and would not inquire into the details.

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[*738]

An attempt was made to show that the sum paid was the full value. But for this purpose the interest was taken at five per cent., and a reduction made of one-third from the result of the calculation; and in this way the value of the reversions was attempted to be reduced from 3,506*l.* 13*s.* to between 700*l.* and 800*l.* But in the whole of this transaction, Thomas Charter relied upon Kingdon's judgment; he consulted Kingdon as to the value of the 13½ acres, the excepted demesnes. Kingdon lived in that part of the county, and was obviously well acquainted with the value of this description of property, which was common in that district; it is by reference, therefore, to his valuation that the fraudulent nature of the transaction must be decided. It is to be observed that in estimating the value of the property purchased at 4,402*l.* 18*s.*, nothing has been taken for the value of the manorial rights.

To the claim as to Axmouth Marsh, no satisfactory answer has been given. It seems to have been retained as a part of the property purchased, although not included in the sale.

The result, then, to which I think the evidence tends, is that the property was purchased by Thomas Charter, in the name of James Charter, at the time when Thomas Charter was acting as agent to Sir John Trevelyan, and employed by him to dispose of it; that Sir John Trevelyan was not informed at the time of the true nature of this transaction; that the *purchase-money paid was greatly below the value; that it was studiously concealed from Sir John Trevelyan, at the time of the reference in 1808, that Thomas Charter had been the purchaser, and that this appears to have been discovered only in consequence of the application made on the part of Thomas Malet Charter to Mr. White, in the year 1825.

[*739]

Under these circumstances, time cannot be set up as a bar to the suit, which in other respects rests upon the clearest principle of equity. I recommend to your Lordships, therefore, to affirm the decree with costs.

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With respect to the petition for leave to file a bill of review, I have, in considering the evidence in the suit, sufficiently expressed my opinion that the newly discovered evidence ought not, if it had been produced at the hearing, to have led to a different result; and the appeal from the order dismissing the petition, ought therefore to be dismissed, and this also with costs.

LORD COTTENHAM:

My Lords, I shall not enter into the facts of this case. The opinion which I have formed upon it, is known from the report of the case when it was heard before me. I have very carefully attended to the arguments at the Bar, bringing under review the grounds on which that judgment proceeded; and I have not found any reason to alter the opinion I then expressed (1).

LORD CAMPBELL:

[*740]

My Lords, I have attended most anxiously to this case, and I am sorry to be obliged to arrive at the same conclusion as my noble and learned friends. It is impossible not to feel most *deeply for the family of Thomas Charter. It may be said almost, that he sins in his grave; for by frauds which he committed in his lifetime, his family is now brought into a state of great affliction. But upon the principles which have guided courts of equity on such occasions, I think it is impossible to do otherwise than to sustain this decree. The *onus* lay in this case on the appellants, clearly to prove that the transaction was fair. I think that that has not been supported, but on the contrary, I think there is direct evidence the other way.

The only doubt which I have had, has been with regard to the lapse of time and acquiescence, and certainly it is of the last importance that there should be a limitation to inquiries of this sort; but for the reasons which have been stated so very lucidly by my noble and learned friend the LORD CHANCELLOR, I am obliged to come to the conclusion that the remedy in this case is not barred by lapse of time, and that the parties have never, with a knowledge of the facts, done anything which can be considered as an acquiescence in the matter complained of. I therefore must conclude in the words used by my noble and learned friend (LORD COTTENHAM), when Master of the Rolls; and I think it is impossible that any language can more clearly or strongly express what is the just result of this case. He says (2), "It does indeed become the duty

(1) See 4 L. J. (N. S.) 209.

(2) *Ibid.* p. 214.

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of the Court, when transactions of long standing are brought before it, most anxiously to weigh all the circumstances of the case, and to consider what evidence there may have been, which from lapse of time may be lost. But beyond this, in cases of fraud, I think time has no effect. Were it *otherwise, the jurisdiction of the Court would be defeated, not because the case was not one for its interference, but because the author of the fraud had been enabled to continue his deception till such a time had elapsed as to prevent the interference of the Court. Such fortunately is not the law; and those who may be disposed fraudulently to appropriate to themselves the property of others, may be assured that no time will secure them in the enjoyment of their plunder, but that their children's children will be compelled by this Court to restore it to those from whom it had been fraudulently abstracted."

[741]

(It was ordered and adjudged that the appeal be dismissed, and that the said decrees and orders be affirmed; and also that the appellants do pay to the respondents their costs in the appeal.)

CHANCERY.

WOOD *v.* LAMBIRTH.

(1 Phillips, 8—16; S. C. 5 Jur. 741.)

1840.

Nov.

1841.

*Jan. 25.**June 28, 29.**Aug. 11.*

Lord

COTTENHAM,

I.C.

[8]

A surrender by the wife of a copyholder with his consent, and after having been separately examined, to the use of a purchaser from the assignees of the husband, who had become bankrupt, held effectual to bar her right of freebench, if any such existed by special custom, although at the time of the surrender, the purchase not having been completed, the purchaser had not any legal estate in the premises.

Doctrine as to the operation of fictitious forms of conveyance.

At a sale of the property of Isaac Brightwen, a bankrupt, by his assignees, in the month of February, 1829, the defendant Henry Lambirth became the purchaser of lot 19, comprising a copyhold messuage and premises of which the bankrupt was at the time of his bankruptcy seised to him and his heirs, according to the custom of the manor of the rectory of Tollesbury, having been admitted tenant upon the surrender of one John Carrington in the year 1806.

[*9]

It appeared from the abstract of title delivered to the purchaser, and which commenced with the year 1794, that in the year 1787 the wife of one James Lufkin, who was then seised of the estate in his own *right, had joined with her husband in a surrender of it by way of mortgage; and that subsequently, on the occasion of the admittance of a party after the death of the same James Lufkin, under a surrender made by him during his lifetime to the use of his will, his widow “came and in open Court remised and released to the purchaser all and all manner of dower and thirds, and other customary estate, right, and title to dower and thirds, and all arrears thereof which she might, should, or of right could or ought to have or claim of, in, to, or out of the said premises.”

Those entries were the only instances appearing upon the abstract, in which the wife or widow of a copyholder had taken part in any surrender of the estate. The purchaser, however, conceived that they afforded presumptive evidence of a special custom in the manor, entitling the widow of a copyholder to freebench out of all copyhold lands of which her husband might have been seised at any time during the coverture; and as the bankrupt had a wife at the time of his bankruptcy, who was still living, the purchaser objected to the title as being liable to her freebench. He also objected, that there was no evidence that Carrington had not a wife

when he surrendered the estate to the use of the bankrupt in the year 1806. No attempt was made by the assignees to remove the latter objection; but for the purpose of removing the former, they procured the wife of the bankrupt to make a surrender, which was entered on the Court rolls as follows:

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“ Be it remembered, that on the 11th day of July, 1829, Mary Brightwen, the wife of Isaac Brightwen (the said Isaac Brightwen being a customary or copyhold tenant of the said manor), came, &c.; and she being first privately examined separately and apart from *her said husband, and freely consenting, did, with the privity of the said Isaac Brightwen, in consideration of the sum of 30*l.* 4*s.* 2*d.* to her paid by Henry Lambirth, surrender into the hands of the lord of the said manor all and singular her right, title, and claim of freebench, dower, or thirds of, in, to, or out of all that, &c.; and all right, title, and interest, claim and demand whatsoever of the said Mary Brightwen of, in, or to freebench in respect of the said messuage and premises, to the use and behoof of the said Henry Lambirth, his heirs, executors, administrators, and assigns, according to the custom of the said manor.

[*10]

“ MARY BRIGHTWEN,
“ ISAAC BRIGHTWEN.”

A copy of that surrender was delivered to the purchaser's solicitor on the 24th of August, 1829; but he, being advised that it was not effectual to bar the wife's right, persisted in his objection to the title, and refused to complete the purchase, whereupon the assignees instituted this suit for a specific performance of the contract. In the progress of the cause Henry Lambirth died, and a supplemental bill was filed against his devisees. By the decree the usual reference was made to the Master, to inquire whether a good title could be made to the estate, and if so, when it was first shown that such title could be made.

The Master having, by his report, found that a good title could be made, and that it was first shown on the 24th of August, 1829, the defendants excepted to the report, insisting that a good title was not shown either before or on the 24th of August, 1829.

The exception came on to be heard before the Lord Chancellor, when

Mr. Lee and *Mr. Heathfield* appeared in support of the exception.

[11]

WOOD
v.
LAMBIRTH.
1841.
Jan. 25.
—

Mr. Walker and Mr. Wood, contra.

THE LORD CHANCELLOR :

The Master has found that a good title can be made to lot 19, and that it was first shown on the 24th of August, 1829.

To this report an exception is taken, and the only question necessary to be considered is, whether there be any objection to the title in respect of the freebench of the wife of Brightwen, a bankrupt, whose assignees are plaintiffs in the cause.

The property being copyhold, and there being no proof of any special custom to the contrary, the right of the wife to freebench can only attach upon lands of which the husband dies seised, which has become impossible. It would therefore seem that this objection would, upon that ground alone, be incapable of being supported; but a surrender has been produced, dated the 11th of July, 1829, by which the wife, having been first privately examined with the privity of her husband, surrendered to the purchaser the copyhold premises, and all her title to freebench therein. This surrender was said to be inoperative for two reasons; 1st, that the wife had not any interest in the land which could be the subject of surrender; and, 2ndly, that the husband was no party to the surrender.

[*12]

The first objection was in early times raised against the effect of fines to bar dower: *Lampet's* case (1). The *surrender by the wife after being privately examined has always been considered, in cases of copyhold, as equivalent to the fine. If it were not so, the decree in *Brown v. Raindle* (2) was a mere delusion upon the defendant.

It was then objected that the husband was not a party to the surrender: nor was he in *Scamon v. Maw* (3), but his assent was presumed from the circumstances. In this case his privity is distinctly stated in the surrender. Then as to the time, it appears that this surrender was sent to the defendant's solicitor on the 24th of August, the day which the Master has reported to be the time at which a good title was shown.

The exception must be overruled.

June 28.
—

The defendants in the supplemental suit, being dissatisfied with that decision, presented a petition of re-hearing, which now came on to be heard.

(1) 10 Co. Rep. 46.

(2) 3 Ves. 256.

(3) 3 Bing. 378.

Mr. Lee and Mr. Heathfield, for the defendants :

WOOD
C.
LAMBIRTH.

There are many manors in which the widow of a copyholder is entitled to freebench out of all such customary tenements as her husband is at any time seised of during the coverture : Watkins on Copyholds (1) ; and the above-mentioned entries on the Court rolls can be accounted for only on the supposition that such a custom exists in this manor. Assuming, then, that the bankrupt's wife is or may be entitled to freebench out of the premises in question, has the surrender which she has made, effectually barred her right? Now, that surrender could operate, if at all, only in one of three ways—either as the transfer of an estate, or as the *release of a right, or by way of estoppel. As a transfer it could not operate, because a wife's right to freebench during the lifetime of her husband is a mere possibility which is not a subject of transfer. Neither could it operate as a release ; because there was no privity of tenure between the surrenderor and the purchaser at the time of the surrender ; he was no party to it, and had no estate or interest beyond a mere equitable right, which the copyhold Courts do not recognise. And the consideration expressed in the surrender, if that could be supposed to make any difference, was merely nominal, no consideration having actually been given. Nor, lastly, could the surrender operate by way of estoppel ; for it has been settled by a series of decisions that a surrender cannot have that effect : *Taylor v. Philips* (2), *Doe v. Tomkins* (3), *Goodtitle v. Morse* (4). * * *

[*13]

Mr. Walker and Mr. Wood, contra. * * *

[14]

Mr. Lee, in reply. * * *

[15]

THE LORD CHANCELLOR :

Aug. 11.

This case having been brought again under my consideration by a petition of rehearing, I have thought it my duty to refer to the several authorities cited, and have reconsidered the whole case with all the attention due to one in which my judgment has been questioned by counsel whose opinions are entitled to the highest respect. I have not, however, been able to find any ground for altering my opinion.

As to Carrington's wife, there is no evidence to raise the objection made ; and as to the supposed freebench of the bankrupt's wife,

(1) Vol. ii. p. 73, note.

(3) 10 R. R. 467 (11 East, 185).

(2) 1 Ves. Sen. 229, see p. 230.

(4) 1 R. R. 719 (3 T. R. 365).

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[*16]

there is in the first place no evidence that she would have been entitled to any, there being no sufficient proof of any custom entitling the widow to freebench of land of which the husband does not die seised; *and as to the surrender by her, no new argument has been brought forward upon the second hearing to prove it ineffectual to bar her freebench if she would otherwise have been entitled to it. Ingenious observations have, indeed, been made as to the manner in which it was to operate; not as a release, it is said, because there is no estate in the releasee, and not as an assignment, because there was only a possibility, and not any assignable estate: but similar objections apply to fines, and to surrenders by husband and wife; and as to fines they prevailed in very early times; but long before Lord Coke's time they were held to be groundless, for he, in *Lampet's* case (1), says, that no question existed at that time.

The truth is that, like many other fictions of law invented for the purpose of promoting the enjoyment of property, the machinery will not bear very critical examination, but being once adopted, it is maintained for the benefit which it is found to confer; technical reasoning has therefore been disregarded when applied to the object of preventing property being alienable on account of the dower or freebench of the wife. In the present case it is peculiarly necessary, because, from the provisions of the Bankrupt Act, the ordinary mode of effecting the purpose may fail. All beneficial interest is taken from the husband, and no surrender is necessary by him, and he may not be forthcoming to make one. How in that case is the wife's freebench to be barred? In this case she was privately examined, and surrendered with the privity of her husband. The second argument has not raised any doubt in my mind, and I must dismiss the petition of rehearing with costs.

BEATTIE v. JOHNSTONE.

(1 Phillips, 17—35; S. C. 10 L. J. Ch. 300; 5 Jur. 671.)

1841.
April 17.

Lord
COTTENHAM,
L.C.

[17]

[SEE the report of this case on appeal to the House of Lords under the title of *Johnstone v. Beattie*, in 59 R. R. 23, taken from 10 Cl. & Fin. 42.]

(1) 10 Co. Rep. 49.

SMITH *v.* THE EAST INDIA COMPANY (1).

(1 Phillips, 50—55; S. C. 11 L. J. Ch. 71.)

A correspondence having passed between the Court of Directors of the East India Company and the Commissioners for the affairs of India (in pursuance of the requisitions of the stat. 3 & 4 Will. IV. c. 85), relating to a dispute which had arisen with respect to a commercial transaction in which the Company had been engaged with a third party: Held, that the correspondence was, on the ground of public policy, a privileged communication, and, consequently, that the company were not bound to produce, or set forth the contents of, it in answer to a bill of discovery, filed against them by such third party, in relation to the transaction to which it referred.

1841.
Nov. 4.
SHADWELL,
V.-C.
On Appeal.
Dec. 23.
Lord
LYNDHURST,
L.C.
[50]

THE plaintiff was the captain of one of the East India Company's ships, in which he sailed in the year 1832 on a voyage from London to Madras and Canton. At Madras he purchased a quantity of cotton from the Company's agents, and shipped it on board the vessel on his own account to Canton, where he sold it, and with the proceeds purchased a cargo of silk, with *which he returned in the following year to London. On his arrival at London the silk was deposited in the Company's warehouses and sold; but in accounting to the plaintiff for the proceeds, the Company, in addition to a deduction for the freight of the silk from Canton to London, claimed to retain a further sum in respect of freight of the cotton from Madras to Canton; which latter claim being resisted by the plaintiff, he brought an action against the Company for the balance of the proceeds, after deducting the freight of the silk, and then instituted this suit for a discovery, and an injunction to restrain the defendants from setting up a bond, which he had executed to the Company's agents at Madras, and which, in addition to a covenant for the payment of the purchase-money for the cotton on the arrival of the ship at Canton, contained also a covenant to pay a certain sum for freight; the bill alleging that the cotton in question was of an inferior quality, and that the plaintiff had purchased it at a higher price than could otherwise have been obtained, in consideration of his being allowed stowage for it to Canton, free of freight; and that upon the bond being tendered to him for execution, he had objected to the covenant as to freight, as being inconsistent with the terms of his contract, and had at length executed it only upon the faith of an assurance from the Company's agent, that it was merely inserted in compliance with the ordinary form used in such cases, and that it was not intended, in this instance, to be enforced.

[*51]

SMITH
v.
THE
EAST INDIA
COMPANY.

[*52]

The bill contained the usual charge as to documents ; in answer to which the defendants referred to three schedules, as containing all the documents in their possession relating to the matters in question, but insisted that they were not bound to produce those comprised in the third schedule, on the ground that they contained *confidential communications, which had passed between the Court of Directors and the Commissioners for the affairs of India, relative to the plaintiff's claim, since the dispute between the parties had arisen, such communications having been made in compliance with the legal obligation, imposed upon the Court of Directors, to consult with the Commissioners before they admitted the claim.

The VICE-CHANCELLOR OF ENGLAND having, on the usual motion, ordered the production of these documents, the East India Company now moved before the Lord Chancellor that that order might be discharged.

Mr. Loftus Wigram (in the absence of *Mr. Lloyd*), in support of the motion, called the attention of the Court to the stat. 3 & 4 Will. IV. c. 85, by which all the beneficial interest in the property, contracts, and engagements of the East India Company was transferred to the Crown for the service of the Government of India, and all the debts and liabilities of the Company were charged upon the Indian revenue ; referring particularly to the 29th section, by which it was enacted " that the Court of Directors should from time to time deliver to the Board of Commissioners for the affairs of India, copies of all minutes, orders, resolutions, and proceedings of all Courts of Proprietors general or special, and of all Courts of Directors within eight days after the holding of such Courts respectively ; and also copies of all letters, advices, and dispatches whatsoever which should at any time or times be received by the said Court of Directors or any Committee of Directors, and which should be material to be communicated to the said Board, or which the said Board should at any time require."

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He then observed that the documents in question were not only confidential communications, but communications which owed their existence to the obligation imposed by that enactment ; and that, inasmuch as that obligation had been created for the public benefit, the documents were entitled to the same privilege of exemption as official communications between a governor, and a law officer, of a colony—orders given by a governor of a colony to a military officer—or a correspondence between an agent of Government and a

Secretary of State—all of which had been held to be privileged on the ground of public convenience.

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EAST INDIA
COMPANY.

Mr. Turner and *Mr. Stevens*, *contra*, observed that this was the first time that the privilege, allowed to official communications, had ever been claimed for a correspondence relating to mere commercial transactions: that all the authorities which had been cited on the other side related to communications of a purely political nature, of which a disclosure not only might, but must necessarily, have been productive of public mischief. * * *

Mr. L. Wigram, in reply.

THE LORD CHANCELLOR (1):

Dec. 23.

[54]

The only question in this case is whether certain documents, being a correspondence between the Court of Directors of the East India Company, and the Commissioners for the affairs of India, contained in the third schedule to the answer of the defendants should be produced.

It was said that they ought not to be produced, because the correspondence was a confidential correspondence; but that is not, of itself, a sufficient reason for the nonproduction of documents which are referred to in an answer. It was then said that it was an official correspondence, and therefore privileged; but an official correspondence is not privileged as such, unless under particular and special circumstances: and therefore it becomes necessary to consider the Act of 3 & 4 Will. IV. c. 85, on which the present claim to exemption is founded.

By that Act, all the territorial possessions of the East India Company are transferred from the East India Company to the Crown, to be held by the East India Company in trust, and to be governed and managed, for the benefit of the Crown. In addition to this, all the property of the East India Company, all their assets, are transferred to the Crown, to be managed by the East India Company in trust for the service of the Government of India. The Company are prohibited from carrying on any commercial transactions, except for the purpose of winding up their affairs, or for the purposes of the Government of India. This is the state of the East India Company in consequence of the Act of 3 & 4 Will. IV.; but, in all those affairs, they are placed under *the superintendence, direction, and control of the Commissioners for the affairs of

[*55]

SMITH
*
THE
EAST INDIA
COMPANY.

India; and in order that that superintendence and control should be exercised effectually and for the benefit of the public, it is necessary that the most unreserved communications should take place between the East India Company, that is, between the Directors of the East India Company, and the Board of Control. And accordingly, there are in the Act of Parliament, particularly I think in the twenty-ninth section, provisions by which the Directors of the East India Company are required to make communication of all their acts, transactions, and correspondence, of every description, to the Board of Control.

Now it is quite obvious that public policy requires, and looking to the Act of Parliament, it is quite clear that the Legislature intended, that the most unreserved communication should take place between the East India Company and the Board of Control, that it should be subject to no restraints or limitations; but it is also quite obvious, that if, at the suit of a particular individual, those communications should be subject to be produced in a court of justice, the effect of that would be to restrain the freedom of the communications, and to render them more cautious, guarded, and reserved. I think, therefore, that these communications come within that class of official communications which are privileged, inasmuch as they cannot be subject to be communicated, without infringing the policy of the Act of Parliament and without injury to the public interests.

I am of opinion, therefore, that the order of the VICE-CHANCELLOR ought, on these grounds, to be discharged.



IN RE PLUMMER, OTHERWISE EX PARTE
SHEPHERD (1).

(1 Phillips, 56—60.)

1841.
Nov. 5.
On Appeal.
Dec. 8.
—
Lord
LYNDHURST,
L.C.
[56]

A creditor, whose debt was secured by the joint and several covenants of two partners in trade, and also by a mortgage on part of the joint property, admitted to prove his debt against the separate estate of each, without surrendering or realising his mortgage security.

THIS was an appeal, in the form of a special case, from the Court of Review.

The material facts, as stated in the case, were, that previously

(1) *Ex parte West Riding Union Banking Co.* (1881) 19 Ch. D. 105, 45 L. T. 546; *Ex parte Culdecott* (1883) 25 Ch. D. 716, 53 L. J. Ch. 618, 50 L. T. 651,

to the issuing of the commission, the bankrupts carried on business in partnership as West India merchants, in the course of which the firm became indebted to George Joad, in the sum of 2,000*l.* for monies lent, and in the further sum of 5,998*l.* 13*s.* 4*d.* for the freight of ships, of which Joad was the owner. Being desirous of obtaining further advances, they assigned to Joad certain West India securities belonging to the firm, and entered into joint and several covenants for the payment of the 2,000*l.* and any further sum or sums which Joad might afterwards advance to them; and about the same time they gave him a similar security for the payment of the 5,998*l.* 13*s.* 4*d.*, and any further sums in which the firm might afterwards become indebted to him for freight, not exceeding 10,000*l.* The amount due from the firm to Joad, at the time of the bankruptcy, on the first-mentioned security was 10,014*l.* 7*s.* 5*d.*, and on the other security 10,742*l.* 4*s.* 5*d.*, in respect of which two debts he tendered a proof to the Commissioners, for the gross sum of 20,014*l.* 7*s.* 5*d.*, against each of the separate estates of the bankrupts. The Commissioners, however, disallowed the proof, and the Judges of the Court of Review having, on two occasions, on which the case was subsequently brought before them (1), been divided in *opinion, it was eventually arranged that an order should be made, allowing the proof, without prejudice to the securities, in order that the question might be submitted, in the form of a special case, to the Lord Chancellor.

In re
PLUMMER.
Ex parte
SHEPHERD.

[*57]

The case now came on to be argued.

Mr. Russell and *Mr. Bagshawe* in support of the appeal:

* * The rule in bankruptcy, that the partnership property is not to be considered as constituting any part of the separate property of either of the partners until all the joint debts are paid, was only established with a view to an equitable distribution among different classes of creditors. * * The decision in *Ex parte Peacock* (2) is no authority for this order, that case being the converse of the present. Each partner has a qualified interest in the property comprised in this security, although it is not actually the separate property of either: whereas in the case of *Ex parte Peacock*, the separate estate, which was the subject of the security, could in no sense be said to be a part of the joint estate which was under administration. * * *

[58]

Mr. Swanston and *Mr. Hall*, *contrà*. * * *

(1) See 1 Mont. Deac. & De G. 101.

(2) 2 Gl. & Jam. 27.

In re
PLUMMER.
Ex parte
SHEPHERD.

Mr. Bagshawe (in the absence of *Mr. Russell*), in reply.

THE LORD CHANCELLOR:

Dec. 8.

[59]

This was a special case stated, under the Act of Parliament, by the Court of Review, for the opinion of this Court. (His Lordship then stated the facts, and proceeded as follows.) Upon these facts the question submitted to this Court is, whether George Joad, being a separate as well as joint creditor of the bankrupts, is entitled to prove his whole debt against their separate estates; or whether he is entitled to prove only for the balance which shall remain due to him after realising the security which he holds upon their joint estate.

Now what are the principles applicable to cases of this kind? If a creditor of a bankrupt holds a security on part of the bankrupt's estate, he is not entitled to prove his debt under the commission, without giving up or realising his security. For the principle of the bankrupt laws is, that all creditors are to be put on an equal footing, and therefore, if a creditor chooses to prove under the commission, he must sell or surrender whatever property he holds belonging to the bankrupt; but, if he has a security on the estate of a third person, that principle does not apply: he is in that case entitled to prove for the whole amount of his debt, and also to realise the security, provided he does not altogether receive more than 20s. in the pound.

That is the ground on which the principle is established; it is unnecessary to cite authorities for it, as it is too clearly settled to be disputed; but I may mention *Ex parte Bennett* (1), *Ex parte Parr* (2), and *Ex parte Goodman* (3), in which it has been laid down.

[60]

The next point is this. In administration under bankruptcy, the joint estate and separate estate are considered as distinct estates: and accordingly it has been held, that a joint creditor, having a security upon the separate estate, is entitled to prove against the joint estate without giving up his security; on the ground that it is a different estate. That was the principle upon which *Ex parte Peacock* proceeded, and that case was decided first by Sir J. LEACH and afterwards by Lord ELDON, and has since been followed in *Ex parte Bowden* (4). Now this case is merely the converse of that, and the same principle applies to it.

On these grounds I am of opinion that the creditor is entitled to

(1) 2 Atk. 527.

(2) 1 Rose, 76.

(3) 3 Madd. 373.

(4) 1 Dea. & Ch. 135.

prove his whole debt, without giving up his security, that security being no part of the estate under administration; and therefore, that the order of the Court below was right; but as the point is one upon which the Judges of that Court have been divided in opinion, on two occasions on which it has been brought before them, I think it is not a case for costs on either side.

In re
PLUMMER.
Ex parte
SHEPHERD.

LLOYD v. WAIT.

(1 Phillips, 61—71; S. C. 6 Jur. 456.)

A plaintiff claiming to redeem a mortgage as heir-at-law of the mortgagor has only to make out a *prima facie* case of heirship. Strict proof cannot be required by the mortgagee.

In a suit for redemption by the heir of a mortgagor against the assignee of the mortgagee, who was also the personal representative of the mortgagor, the Court, besides the usual decree for redemption, declared the plaintiff entitled to have the balance which should be found due from him, and which should be paid by him to the defendant, in respect of the mortgage debt, interest, and costs of the redemption, repaid to him out of the personal estate of the mortgagor in a due course of administration, and decreed accordingly, the bill being properly framed with a view to such relief.

1841.
Nov. 11, 12,
15, 24.
Dec. 9.
1842,
Jan. 25.

Lord
LYNDHURST,
L.C.
[61]

THE bill was filed by the plaintiff, as heir-at-law of Martin Lloyd, who had died intestate in the year 1837, having mortgaged his real estate for a term of 500 years, to secure the sum of 1,000*l*.

The defendants, who were of the family of the intestate's mother, were his administrators. And the bill alleged that one of them, John Wait, being aware of the plaintiff's title, and in order to defeat it or to obtain an undue advantage over him in any attempt which he might make to recover possession, had lately paid off the mortgage and taken an assignment of the term, and had prevailed upon the tenants of the estate to pay their rents to him, and that he had also possessed himself of the title deeds. And it prayed a declaration that the plaintiff was entitled, as heir-at-law of the intestate, to redeem *the mortgage; that the amount of the rents received by the defendant, John Wait, might be set off against the amount due upon the mortgage; and that, upon payment of what should then remain due, either out of the personal estate of the intestate, which it prayed might be applied to that purpose, or, if that should be insufficient, by the plaintiff personally, the defendant John Wait might be decreed to assign the term, and deliver up the title deeds to the plaintiff.

[*62]

The defendant, John Wait, by his answer denied the plaintiff's title, and stated his belief that he was himself the heir-at-law of

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WAIT.

the intestate, and insisted that he was entitled, in that character, to the equity of redemption of the estate. He admitted, however, that he was aware of the plaintiff's claim when he took the assignment; and that upon the execution of the assignment he had applied in the usual manner to the tenants of the estate to pay their rent to him, which they had accordingly done; but he denied that his object in taking the assignment was to defeat the plaintiff's claim, or to obtain any undue advantage over him.

[*63]

The only question in the cause was, as to the plaintiff's title as heir-at-law. In support of his pedigree, which was extremely complicated, being traced through a common ancestor of the fourth generation back, the plaintiff entered into a great deal of documentary as well as some parol evidence, part of which went to prove that the families composing the ascending and descending lines of the pedigree, and both of which, it appeared, had removed from Gloucestershire, where the common ancestor had resided, to London, about the middle of the last century, had, down to a certain period, kept up an intercourse together, and mutually acknowledged each other as relations. On the other *hand, the defendant, John Wait, examined several witnesses for the purpose of showing that the intestate had, during his lifetime, held no intercourse with the plaintiff's family, nor had ever referred to them when enumerating his relations: but the defendant entered into no evidence in support of his own claim to be heir-at-law; and it was proved that shortly after the filing of the bill the plaintiff had by letter applied to him to consent to an immediate decree, directing an issue for the purpose of trying the plaintiff's title as heir-at-law, and that that offer had been rejected.

The cause now came on to be heard before the Lord Chancellor, and the only question was, whether the plaintiff's heirship was sufficiently made out to entitle him to an immediate decree for redemption, or whether an issue should be directed.

The *Solicitor-General*, Mr. Girdlestone, and Mr. Shebbeare, for the plaintiff, contended that the evidence, as it stood, was sufficient to warrant an immediate decree according to the prayer of the bill; [and they cited *Pym v. Bowreman* (1), *Nicol v. Vaughan* (2), and other cases.]

Mr. Richards, Mr. Sharpe, and Mr. Roupel, for the defendant John Wait.* * *

(1) 19 R. R. 201 (3 Swanst. 241, n.). (2) 35 R. R. 60 (5 Bligh, N. S. 505).

Mr. Robertson appeared for the other defendant.

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v.
WAIT.
[64]

The *Solicitor-General* in reply. * * *

THE LORD CHANCELLOR now delivered judgment :

[66]

This was a bill filed by the plaintiff Richard Lloyd, against a personal representative of one Martin Lloyd, who had obtained an assignment of a mortgage: and the object of the bill was to redeem the mortgage. The principal discussion was upon a matter of evidence, as to whether the plaintiff had or had not made out his title as heir-at-law of Martin Lloyd the intestate. But it was contended that, under the circumstances of the case, it was proper that the defendant should have the option of taking the opinion of a jury on that point, and of contesting the right of the plaintiff in a court of law.

The first question, then, to be considered, is a question of fact, as to the pedigree. (His Lordship then took an elaborate view of the documentary evidence, exclusive of those parts of it which, depending for their admissibility and effect upon parol testimony, had been the subject of dispute at the Bar. And he concluded *by declaring it as his opinion that that evidence alone was not only sufficient to prove the pedigree, but that it also went far to prove an intercourse of relationship between the families composing the ascending and descending lines of the pedigree—a circumstance, his Lordship observed, which was not immaterial; because, as they both appeared to have removed to London about the same period, the case would have been one of suspicion, unless some intercourse had been proved to have subsisted between them subsequently to that time. As to the parol evidence upon that point, his Lordship, after taking a review of it, concluded by observing that there was no necessary inconsistency in it, inasmuch as the plaintiff's witnesses referred to a different period from those of the defendant; and the estrangement between the two families during the more recent period, to which the latter testimony referred, might easily be accounted for by the difference which appeared to have taken place in their respective circumstances. His Lordship then proceeded as follows :) The parol evidence then is confirmatory of the documentary evidence, which, in itself, is exceedingly strong: and the result is, that, in my opinion, the plaintiff's case is clearly made out and established.

[*67]

But then it is said that the defendant is entitled to have an

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*
WAIT.

[*68]

opportunity of contesting the claim of the plaintiff at law. Let me, however, direct attention to the circumstances in which the defendant stands. He was one of the personal representatives of the intestate; there was the mortgage outstanding; he knew of the claim of the plaintiff; he admits that in his answer—and, knowing of the claim of the plaintiff, he paid the principal and interest, and obtained an assignment of the mortgage. He says he did not do it to defeat the plaintiff's claim; but he knew of the claim: he obtained the assignment, *and the effect of that was, to impede the claim. After he had obtained the assignment, he says he gave notice to the tenants in the usual way, informing them that he had obtained it, and requiring payment of the rents; they paid the rents, and have continued to pay them, accordingly. He therefore obtained possession in the character of mortgagee. It is true that in his answer he says, "though I acquired the possession as mortgagee, I claim the equity of redemption as heir-at-law of the intestate;" but he gives not the slightest evidence to show that he is heir-at-law. He holds the estate, therefore, merely in the character of mortgagee, and, standing as he does in that situation, and a strong case being made out against him, where even a *prima facie* case would have been sufficient, he cannot, as a matter of right, be entitled to have a trial at law.

[*69]

Having, then, no such right, the Court is asked, in the exercise of its discretion, to allow him a trial. For what purpose? He does not state what facts are to be proved or what are to be controverted; but he insists generally that the evidence ought to be sifted on cross-examination. I do not think, however, that, in a case like this, the Court would be justified in allowing the defendant a trial at law before a decree for redemption is made. I think it would be a very improper exercise of the authority of the Court, and a very unsound exercise of its discretion, which would create great delay; and nobody can look at these proceedings and the nature of the evidence produced, without seeing that the expense consequent upon it would be enormous. But what is the situation of the defendant? If he has really a title as heir-at-law, this decision will not preclude him from asserting it hereafter at law or in equity, as he may be advised, according to the nature of the case. The only thing determined by this decree is *the redemption of the mortgage: he will have his principal and interest repaid; and, after that, he will be in a situation to contest the plaintiff's claim. He has the less reason to complain, because from the

correspondence which took place between the parties it appears that he might, if he had thought proper, have had the question in the first instance decided at law. He did not choose to do so; and I think that under such circumstances the Court, being satisfied that the pedigree has been satisfactorily established, ought not to allow him to have a trial at law before it pronounces a decree in this cause for the redemption of the mortgage.

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WAIT.

WOODCOCK *v.* RENNECK.

(1 Phillips, 72—74; S. C. 11 L. J. Ch. 110; 6 Jur. 138; affg. 4 Beav. 190.)

[A NOTE of the judgment on this appeal, affirming the decision of the MASTER OF THE ROLLS (4 Beav. 190), will be found at the end of the report of the case in the Rolls Court; see 55 R. R. at p. 47.]

1841.
Nov. 8, 10, 16.

Lord
LANGDALE,
M.R.

On Appeal.

1842.
Jun. 31.

Lord
LYNDHURST,
L.C.

[72]

VAUGHAN *v.* BUCK (1).

(1 Phillips, 75—81.)

Where a testator bequeaths the whole of his property to persons in succession and specifically enumerates particular items which are thus given to his wife for her life, she is entitled to the enjoyment in specie of those items although of a wasting character.

HENRY WILLIAM VAUGHAN made his will, dated 12th of May, 1830, as follows: "First, I will and bequeath to my beloved wife Elizabeth Vaughan, the whole of my property during her natural life, and after to be equally divided between my surviving children, excepting a moderate sum, say 30*l.* or 40*l.*, to put my eldest son Henry Vaughan apprentice to any trade that he may chance to fancy, and the same to my second son Charles Vaughan, should he live. I will and bequeath to my two sons Henry Vaughan and Charles Vaughan the sum of 100*l.* each on their becoming of age. I also will and bequeath the sum of 100*l.* to each of my daughters Sarah Vaughan and Emma Vaughan, when they become of age, should they live. I give to my son Henry my watch and some of my books, such as he may like best, or his mother may think most use to him. My furniture, clothes, books, &c. I leave to my wife. The property, my house, 21, North Street, St. Marylebone, let on lease at 48*l.* a year, 1,000*l.* New 4 per Cent., 1,500*l.* in the 3 per cent.

1841.
May 24.

SHADWELL,
V.-C.

On Appeal.
Nov. 16, 20.

Lord
LYNDHURST,
L.C.

[75]

(1) *Tickner v. Old* (1874) L. R. 13 Eq. 422, 31 L. T. 29; *Porter v. Baddeley* (1877) 5 Ch. D. 542.

VAUGHAN
v.
BUCK.

Consols, 645*l.* in the Threes Reduced, and 20*l.* per annum in the Long Annuities, all this I give to my wife, with the residue and interest, should there be any."

[76]

The testator died in the month of March, 1838. His widow took out letters of administration with the will annexed, and afterwards married the defendant William James Buck. The bill was filed by Henry Vaughan, *one of the testator's sons, against his mother and her second husband, and the other children of the testator, for the purpose of having the rights of all parties interested under the will ascertained.

In addition to the house No. 21, North Street, which was leasehold, the testator was at the time of his death possessed of another leasehold house in the same street, which he had purchased after the date of his will. The rest of his property, at the time of his death, exclusive of his furniture, clothes, books, &c. which were of small value, consisted of some shares in a Gas-light and Coke Company, and of the following sums of stock, viz.: 1,500*l.* New 3*l.* 10*s.* per cent. Bank Annuities, 5,600*l.* 3*l.* per cent. Consols, 1,590*l.* 3*l.* per cent. Reduced, and 24*l.* per annum in the Long Annuities.

By the decree of the VICE-CHANCELLOR OF ENGLAND, made, upon the hearing of the cause, on the 24th May, 1841, it was declared that the defendant Elizabeth Buck (formerly Elizabeth Vaughan), was entitled during her natural life to the income of the general residue of the testator's estate; and that the house in North Street, and the several sums of New 4*l.* per cent. Annuities, 3*l.* per cent. Consolidated Annuities, 3*l.* per cent. Reduced Annuities, and Long Annuities, mentioned in the will, or such of them as the testator should appear to have possessed at his decease, formed part of such general residue. And it was ordered (amongst other things), that the above-mentioned shares in the Gas-light and Coke Company, and the 24*l.* Long Annuities, and the leasehold estates of the testator should be sold, and that the proceeds should be invested in the purchase of Bank 3*l.* per cent. Annuities, subject to the further order of the Court.

[77]

From that part of the decree the defendant W. J. Buck appealed, and the appeal now came on to be heard.

Mr. Richards and *Mr. Rogers*, in support of the appeal * * insisted that there was an obvious intention that those enumerated particulars should be enjoyed by her in specie. * * They cited

Howe v. Lord Dartmouth (1), *Alcock v. Slopér* (2), *Collins v. Collins* (3), *Bethune v. Kennedy* (4), *Pickering v. Pickering* (5), *Lichfield v. Baker* (6), *Goodenough v. Tremamondo* (7).

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Buck.

Mr. Keene, for the defendant Elizabeth Buck (who appeared separately from her husband), submitted to the judgment of the Court.

Mr. Girdlestone, *Mr. Bethell*, *Mr. Steere*, and *Mr. Wilkinson*, for the testator's children, [cited *Mills v. Mills* (8)]. With respect to the case of *Collins v. Collins*, cited on the other side, they said that what was reported as a decision was in fact a mere *dictum*, inasmuch as the case was not ripe for adjudication upon the point of conversion, and, accordingly, the decree of Sir J. LEACH, as drawn up, was confined to a reference to the Master to take the usual accounts of the testator's estate (9). They also stated that, upon the case coming on for further directions before Lord Langdale, a compromise took place, and an order was taken, by consent, for the sale of the property in dispute.

[78]

Mr. Richards, in reply.

THE LORD CHANCELLOR :

Nov. 16.

This is a question arising out of the will of William Henry Vaughan. The testator appears to have been an illiterate person, and to have drawn up the will himself. It is difficult to form a very confident opinion as to the intention of the testator in an instrument so framed.

He begins by bequeathing to his wife the whole of his property during her natural life, and afterwards to be *divided between his surviving children, excepting two small sums for the purpose of putting out his sons as apprentices to some trade. He then gives 100*l.* to each of his said sons, and the same sum to each of his two daughters. His furniture, clothes, books, &c., which are stated in the answer to have been of small value, he gives to his wife. The total amount of these legacies bears an inconsiderable proportion to the property disposed of by this will. After these bequests, the

[*79]

(1) 6 R. R. 96 (7 Ves. 137).

(2) 39 R. R. 334 (2 My. & K. 699).

(3) 39 R. R. 337 (2 My. & K. 703).

(4) 43 R. R. 153 (1 My. & Cr. 114).

(5) 48 R. R. 104 (4 My. & Cr. 289).

(6) 50 R. R. 255 (2 Beav. 481).

(7) 50 R. R. 262 (2 Beav. 512).

(8) 40 R. R. 176 (7 Sim. 501).

(9) This appears to be the case. Reg. Lib. 1832, A. p. 3497.

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*
BUCK.

will proceeds thus: (His Lordship then stated the concluding clause of the will, and proceeded as follows:)

It is contended on the part of the appellant that the widow took an absolute interest in the property mentioned in this clause. I am of opinion that this is not the true construction of the will, and that such was not the intention of the testator.

The clause extends to the whole of the testator's property, except the small legacies which he had before given. It comprehends not only the property which he particularly mentions, but also the residue, which is expressly named. It is difficult to suppose that the testator, after having, a few lines before, given the whole of his property to his wife for life, should have intended by this clause to give the same property to her absolutely. It is not reasonable to put such a construction upon the will, if it admits of any other interpretation. But I think it does admit of an easy and consistent construction.

The testator had, in the former part of his will, given the whole of his property in general terms to his wife for her life; and then, after making a few inconsiderable exceptions, (inconsiderable as compared to the whole amount of the property), he gives the property, *(referring evidently, I think, to the former part of the will, and stating particularly of what that property consisted), to his wife, with the residue and interest, should there be any—meaning, as I understand it, merely to enumerate in detail what he had before given in general terms, and not to make a new disposition of his property. This appears to me a very natural construction, and it reconciles the two clauses of the will. I am of opinion, therefore, that the widow took only a life interest in the property in question.

[*80]

The next point that has been raised is, whether the whole of the property is to be converted, or whether a part of it is to be enjoyed by the widow in specie. The question is one of intention, and is material only as regards the leasehold house specifically mentioned and the 20*l.* Long Annuities. We ought, I think, to put the same construction upon the will in this respect, as if the enumeration of the property had been inserted in the first clause, as if it had run thus: "I give the whole of my property, viz., my house, 21, North Street, Marylebone, let on lease at 48*l.* a year, 1,000*l.* New 4 per Cents., 1,500*l.* in the 3 per cent. Consols, 645*l.* in the 3 per cents. Reduced, and 20*l.* per annum in the Long Annuities, with the residue and interest, if there should be any, to my wife for life, and after to be divided equally between my surviving children."

With respect to the house, the bequest is clearly specific; and as to the 20*l.* per annum Long Annuities, they constitute one of the items in the testator's property existing at the date of the will, and which by this description he bequeathed to his wife. Supposing, therefore, which I presume to be the case, that this sum formed a part of the 24*l.* per annum Long Annuities which the testator held at his death, I think the widow *is entitled to this in specie. The case of *Bethune v. Kennedy* (1) is similar in principle, and corresponds nearly in its circumstances with the present.

VAUGHAN
Buck.

[*81]

With respect to the New 4 per Cents., the testator had no such stock at the time of his death. Independently, therefore, of other considerations into which it is unnecessary to enter, it is sufficient to observe that there is nothing to show beyond mere conjecture, that the 3½ per Cents. were a substitute for the New 4 per Cents., upon which alone this part of the claim was founded.

The decree will, therefore, be varied so as to give the widow the enjoyment of the leasehold premises mentioned in the will, and the 20*l.* Long Annuities, in specie during her life.

PRICE v. NORTH.

(1 Phillips, 85—88; S. C. 11 L. J. Ch. 68; 5 Jur. 1147; Varying 4 Y. & C. Ex. Eq. 509.)

The implied charge of debts on a testator's real estate which arises from a general testamentary direction to pay his debts is not restricted by a subsequent bequest of his residuary personal estate subject to the payment of his debts.

1841.
Nov. 22.
On Appeal.
Dec. 20.
—
Lord
LYNDHURST
L.C.
[85]

THIS was a creditor's suit, instituted in the Court of Exchequer, for the administration of the estate of the testator Roderick Gwynne, and for the execution of the trusts of his will.

The will commenced in these words: "First, I will that all my just debts, funeral expenses, and the costs and charges of proving this my will, be fully paid and satisfied." The testator then devised all his real estates to his daughter and her issue in strict settlement. He then gave to his servant David Armstrong 50*l.* and all his clothes. And all his ready money, money in the funds, and securities for money, goods, and chattels, and all other his personal estate and effects whatsoever and wheresoever, (after and subject to the payment of all his just debts, funeral and testamentary expenses, and the legacies thereinbefore bequeathed), he gave and bequeathed unto his said daughter, to be assigned, transferred, and

(1) 43 R. R. 153 (1 My. & Cr. 114).

PRICE
f.
NORTH.

paid to her at her age of twenty-one years or day of marriage, with a gift over in the event of her dying under that age and unmarried.

By the order made on the hearing of the cause for further directions before the Lord Chief Baron, it was declared that the proceeds of the testator's real estates, which had been sold under the decree, were legal assets, and they were ordered to be applied accordingly [as reported in 4 Y. & C. Ex. Eq. 509].

[86]

The administrators, with the will annexed, of the testator, on behalf of the simple contract creditors, appealed from that order to the Lord Chancellor, under the 5 Vict. c. 5, s. 22, and the appeal now came on to be heard.

Mr. Swanston and *Mr. Coleridge*, in support of the order below, relied on *Douce v. Lady Torrington* (1) and *Palmer v. Graves* (2); and contended, upon the authority of those cases, that the presumption, arising from the first clause of the will, of an intention on the part of the testator to charge his real estate with his debts, was rebutted by the words "after and subject to the payment &c.," in the subsequent clause; inasmuch as those words could otherwise have no operation or meaning at all. They also adverted to the circumstance, that the real estates were devised in strict settlement, as strengthening that construction.

Mr. Girdlestone and *Mr. Neate*, for the appellants, cited *Clifford v. Lewis* (3) and *Graves v. Graves* (4).

Mr. Coleridge, in reply.

Dec. 20.

THE LORD CHANCELLOR, after stating shortly the material substance of the will, said :

The question is, whether this will constitutes a charge upon the testator's real estate, for the payment of his debts. Now, the first direction in the will clearly amounts to a charge : that is admitted ; but it is only a charge by implication, and may therefore be rebutted, provided there be any thing to be found in other parts *of the will inconsistent with the supposition that such was the testator's intention. Thus, in *Thomas v. Britnell* (5) the testator first ordered all his debts and funeral charges to be honourably paid after his decease ; but in a subsequent clause he devised all his real estate, with a

[*87]

(1) 39 B. R. 308 (2 My. & K. 600).

(2) 44 B. R. 110 (1 Keen, 545).

(3) 22 B. R. 228 (6 Madd. 33).

(4) 42 B. R. 92 (8 Sim. 43).

(5) 2 Ves. Sen. 313.

certain exception, to trustees, in trust for the payment of his debts, funeral expenses, and legacies, at the same time directing, that the excepted estates should be applied first to payment of the legacies. That specific appropriation of a part only of his estates to the payment of debts, was clearly inconsistent with an intention to charge the estates generally. So, in *Douce v. Lady Torrington*, the will commenced with a similar clause: but, by the codicil, the rents and profits of the testator's real estate were charged with the payment of 200*l.* a year to his son, and the residue only was to be applied to the discharge of the testator's simple contract debts. That was also clearly inconsistent with a general charge of debts on the real estate, and so it was accordingly held. The case of *Palmer v. Graves* perhaps goes further; but that decision was professedly founded on the two last mentioned cases, and cannot therefore be considered as laying down any new principle.

PRICE
v.
NORTH.

Now, what is here relied on for repelling the implication? It is the last clause. But when the testator bequeaths his personal estate, "after and subject to the payment of his debts," he does nothing inconsistent with an intention to charge his real estate with them also as an auxiliary fund; and, therefore, such a direction cannot control the operation of the general charge. Courts of equity have always been desirous of sustaining such charges for the benefit of creditors, and the presumption in favour of them is not to be repelled by anything *short of clear and manifest evidence of a contrary intention.

[*88]

The decree therefore must be varied, by declaring that the real estates are equitable assets instead of legal.

RUNDELL v. LORD RIVERS.

(1 Phillips, 88—91; S. C. 11 L. J. Ch. 27; 6 Jur. 89.)

[A BETTER report of this case, taken from 11 L. J. Ch., p. 27, will be found in 59 R. R. 586.]

1841.
Nov. 22.
Dec. 6.
—
Lord
LYNDHURST,
L.C.
[88]

HERRING *v.* CLOBERY (1).

(1 Phillips, 91—96; S. C. 11 L. J. Ch. 149.)

1842,
Feb. 11, 12.Lord
LYNDHURST,
L.C.
[91]

Where an attorney is employed by a client professionally, to transact professional business, all the communications which pass between them in the course, and for the purpose of that business, and not those only which relate to litigation commenced or in contemplation, are privileged communications.

By a memorandum of agreement, dated the 7th of February, 1826, and made between Elizabeth Herring, widow, of the one part, and John Herring Clobery, her eldest son, of the other part, it was agreed that in consideration of a certain sum of money to be paid by J. H. Clobery to or on account of Elizabeth Herring, the family estates, of which Elizabeth Herring was then tenant for life, with remainder to J. H. Clobery, as to part, in tail, and as to the rest, in fee, should be resettled to the use of J. H. Clobery for life, with remainder to his first and other sons in tail, with remainder to his daughters in tail, with certain remainders over to the younger son and only daughter of Elizabeth Herring and their respective children. A recovery was accordingly suffered; but the deed by which the uses of the recovery were declared, and which bore date the 11th of April, 1826, varied in several particulars from the terms of the agreement as contained in the memorandum. In the year 1837, the bill in this cause was filed by Elizabeth Herring and her younger son and his only daughter, whose interests under the memorandum *were prejudiced by the variations, against J. H. Clobery and other parties; alleging that Elizabeth Herring had executed the deed under the impression that it was framed in conformity with the terms of the memorandum, and that the plaintiffs had only recently discovered the contrary, and praying, therefore, that the deed might be rectified, and made conformable to the agreement as contained in the memorandum.

['92]

The defence set up to the bill was, that the terms of the agreement had been altered previously to the execution of the deed, with the knowledge and consent of both the contracting parties; and that the deed, as it stood, was in conformity with the agreement as so altered.

Amongst other witnesses examined by the defendants, was one Thomas Pearse, who had acted as the solicitor of Elizabeth Herring in the transactions connected with the resettlement of the estates, but who had, very shortly after the execution of the deed of April,

(1) *Wheeler v. Le Marchant* (1881) 17 Ch. Div. 678; 50 L. J. Ch. 793; 44 L. T. 632.

1837, ceased to be employed by her, and had never acted for her since. His evidence went to prove that she was not only privy to, but had herself suggested the variations in the agreement; and that she had executed the deed with deliberation, and with full knowledge of its contents.

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By the decree made on the hearing of the cause before the Vice-Chancellor of England, the bill was dismissed with costs.

At the rehearing of the cause before the Lord Chancellor, Elizabeth Herring being dead, an objection was taken on the part of the surviving plaintiffs to the reception of a great part of Pearse's evidence, on the *ground of its being a disclosure of communications made to him by Elizabeth Herring in the course of his employment as her solicitor, or of acts done by her at interviews between them at which he had been present in that character.

[*93]

Mr. Tinney, Mr. Wakefield, and Mr. Romilly, argued for the plaintiffs in support of the objection, and cited the following cases: *Cromack v. Heathcote* (1), *Harvey v. Clayton* (2), *Walker v. Wildman* (3), *Cholmondeley v. Clinton* (4), *Greenough v. Gaskell* (5), *Sawyer v. Birchmore* (6), *Desborough v. Rawlins* (7).

Mr. Richards, and Mr. Wright, for the defendant J. H. Clobery, *contra*, [cited *Wadsworth v. Hamshaw* (8), *Bolton v. The Corporation of Liverpool* (9), and several *Nisi Prius* cases before Lord Tenterden, in which the protection had been limited to communications where a controversy had arisen].

Mr. Bethell, Mr. Reynolds, and Mr. Hare, appeared for other defendants.

Feb. 12.

THE LORD CHANCELLOR:

I have considered the authorities that were cited the other day, and the arguments that were urged with reference to the evidence of Mr. Pearse, and I am of opinion that the principle acted upon in the case of *Cromack v. Heathcote* (1), which was cited at the Bar, is the correct principle; namely, that where an attorney *is professionally employed by a client, any communications which pass

[*94]

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| (1) 22 R. R. 638 (2 Brod. & B. 4). | (6) 41 R. R. 133 (3 My. & K. 572). |
| (2) 19 R. R. 66 (2 Swanst. 221, n.). | (7) 45 R. R. 320 (3 My. & Cr. 515). |
| (3) 22 R. R. 234 (6 Madd. 47). | (8) 22 R. R. 639, n. (2 Brod. & B. |
| (4) 13 R. R. 183 (19 Ves. 261). | 5, n.). |
| (5) 36 R. R. 258 (1 My. & K. 98). | (9) 36 R. R. 251 (1 My. & K. 88). |

HERRING
*
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between them for the purpose of that employment are privileged communications. I think that that decision of the Court of Common Pleas is in conformity with the previous decisions, and with the general understanding of the profession.

[*95]

[After referring to the *Nisi Prius* decisions above mentioned, his Lordship said:] I think that restriction of the rule is not consistent with, and not founded on, any *sound principle; for it may, and in a great variety of cases would, be of as much importance to parties that the communications made between a client and a solicitor with respect to the state of the client's property, with respect to his liabilities, with respect to his title, should be protected, as that protection should be afforded to communications made in the progress of a cause; and it appears to me that, as individuals must from time to time resort to their legal advisers for guidance in their ordinary transactions, public policy requires that communications of that kind should be privileged and protected, in order that they may be free and unfettered.

If, therefore, the cases stood here, I should be inclined to adhere to the decision of the Court of Common Pleas, in preference to adopting that which I consider to be a new rule laid down by Lord TENTERDEN. In fact, however, the cases do not rest here. A case which came before this Court in the time of Lord Brougham (1), was very elaborately discussed at the Bar, and it was considered very much in detail by the LORD CHANCELLOR: he delivered a very elaborate judgment upon the subject, and that judgment supports the decision of the Court of Common Pleas. But still further, the question came before this Court again (2) during the time of my immediate predecessor, Lord Cottenham; and though he was not called upon, from the particular circumstances of the case, to pronounce any decision upon the general question, yet it is quite clear, from the scope of his observations and the line of argument that he pursued, that he was inclined to adopt the principle laid down by the Court of Common Pleas.

[96]

I therefore entertain no doubt as to the principle upon which I ought to act in this case with respect to Mr. Pearse, and I lay down this rule with reference to this cause, that where an attorney is employed by a client professionally, to transact professional business, all the communications that pass between the client and the attorney in the course, and for the purpose, of that business, are

(1) *Greenough v. Gaskell*, 36 R. R. 258 (1 My. & K. 98).

(2) *Desborough v. Rawlins*, 45 R. R. 320 (3 My. & Cr. 515).

privileged communications ; and that the privilege is the privilege of the client, and not of the attorney. It is easy to apply this to the evidence of Mr. Pearse, as it is read in detail. There will be no difficulty, therefore, in saying what part of the evidence is to be admitted, and what part is to be excluded (1). .

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v.
CLOBERY.

JONES v. PUGH:

(1 Phillips, 96—103 ; S. C. 12 Sim. 470 ; 11 L. J. Ch. 323 ; 6 Jur. 613.)

R., a solicitor, having taken a mortgage upon the property of P. in his own name, but really on behalf of certain clients, by whom he had been confidentially employed to procure investments for their money, and having also been employed at different times in effecting mortgages upon parts of the same property for other clients who had taken the securities in their own names: Held, on a bill being filed against R. and P. by a judgment creditor of the latter, to redeem the mortgaged premises, that R. was not bound to disclose the names either of the cestuis que trust of the mortgage to himself, or of the parties by whom he had been employed in the other mortgages.

1842.
June 27.

SHADWELL,
V.-C.

On Appeal.
July 6.

Lord
LYNDHURST,
L.C.

[96]

THIS was an appeal from an order of the VICE-CHANCELLOR OF ENGLAND, by which he had held the answer of the defendant Richard Roy to the amended bill to be insufficient.

The plaintiff was a judgment creditor of the defendant Pugh, and the bill, as originally framed, after stating that the plaintiff had caused his judgment to be duly docketed according to the statute, and that he had *sued out an *elegit* upon it, alleged that some time in the month of October, 1834, Pugh had executed an indenture by which he had conveyed and assigned all his real and personal estate to Roy, upon trust to sell and apply the proceeds in payment of certain debts of Pugh's, including the debt for which the plaintiff's judgment had been recovered ; and that Roy had since sold the premises comprised in the indenture, and had then in his hands a sum of money arising from the sale, which the bill prayed might be applied in satisfaction of the plaintiff's judgment.

[*97]

The defendant Roy, who was a solicitor carrying on business in partnership with several other persons, in his answer to that bill, denied that Pugh had executed to him any such indenture as was alleged in the bill, or any other indenture for the benefit of his creditors generally ; but he admitted that Pugh did, in or about the year 1834, execute several mortgages to several clients of the defendant and his partners, and that as to one of such mortgages,

(1) See the next case.

JONES
v.
PUGH.

which was dated the 29th of October, 1834, and made for securing the sum of 20,000*l.* to certain clients of the defendant and his partners, who had, through the medium of the defendant, advanced that sum to Pugh, he the defendant was appointed a trustee therein for such mortgagees: that he was not in any way interested or concerned in any of the other mortgages before mentioned, and that he was unable to set forth any of the particulars of such mortgages, or of the parcels or property comprised in them, without having recourse to documents which he and his partners held as solicitors for the several parties interested therein; and that he could not disclose any of such particulars without a violation of professional confidence.

[*98] Upon that answer being put in, the plaintiff amended his bill by stating the conveyance to Roy as a mortgage, *and praying that he might be let in to redeem it; with a view to which relief, the amended bill, after suggesting that it was alleged that the legal estate in the mortgaged premises was not vested in Roy under the mortgage of October, 1834, and, moreover, that the plaintiff was not the person entitled to redeem that mortgage, charged, amongst other things, that the defendant ought to answer and set forth who had been and were the persons beneficially interested under the indenture of October, 1834, and whether prior and subsequently thereto, any and what mortgage or mortgages, or other and what security or securities had been made, and when, and by whom, and to whom, upon all or any, and what part of the said real and personal estates of Pugh, and for what sum or sums of money respectively; and who had been or were the persons interested in such mortgages or securities respectively. These questions were also incorporated, by reference, into the interrogating part of the bill.

The defendant Roy, in his answer to the amended bill, set forth the substance of the indenture of October, 1834, which purported (according to his statement), to be made between Pugh of the one part, and Roy of the other part, and to create a charge upon certain real and personal property of Pugh, (the particulars of which were also set forth in schedules to the answer), by way of security for the sum of 20,000*l.*, therein recited to have been advanced by Roy to Pugh. He then averred that the money was by the said indenture made payable to himself, and that no trust was therein declared or referred to for the benefit of any other person, and that he was authorized by his clients, and was entitled,

to receive payment of the mortgage money and interest, and, upon receipt thereof, to give a good discharge for the same and to transfer the security. He *further stated that the said indenture was then in the custody of himself and his partners as solicitors for the parties beneficially interested therein : and he added, that it was a frequent practice of the firm to which he belonged, to lay out monies, intrusted to them by their clients for investment, in his the defendant's own name, under a private trust and confidence between himself and the clients, that their names should not be disclosed. Under these circumstances, he submitted that he was not bound to set forth who were the persons beneficially entitled under the indenture of October, 1834. With respect to the other questions above mentioned, he denied that the legal estate in any lands, tenements, or hereditaments belonging to Pugh was then or ever had been vested in him, or that either prior or subsequent to the mortgage of October, 1834, any mortgage or other security had been made to him, of or upon all or any part of the real or personal estate of Pugh ; and he added that he had no knowledge or information respecting any of such prior or subsequent mortgages as were alleged by the bill, except what he had acquired in his character of solicitor for the mortgagees, and which, for the reasons mentioned in his former answer, he submitted that he ought not to disclose.

JONES
v.
PUGH.
[*99]

To that part of the answer the plaintiff took several exceptions for insufficiency : the first, applying to that part of the enquiry which related to the mortgage of October, 1834 ; and the other two, to those parts which related respectively to mortgages prior and subsequent to that security. All the three exceptions were allowed by the Master, and exceptions taken by the defendant to the Master's report, were overruled by an order of the VICE-CHANCELLOR, which was the subject of the present appeal (1).

The appeal now came on to be heard.

[100]

Mr. Bethell and *Mr. Cole*, for the appellant. * * *

Mr. Richards and *Mr. Wigram*, *contra* :

* * The information, which the defendant refuses to give, is, in its nature, not a proper subject of professional privilege, inasmuch as it consists of matters of fact, and not of confidential communications made to the *solicitor for the purpose of obtaining

[*101]

(1) 12 Sim. 570. A short note of that report and of the result of this appeal will be found in 56 R. R. 97.

JONES
v.
PUGH.

legal advice: [They cited *Sawyer v. Birchmore* (1), *Parkhurst v. Lowten* (2), and other cases to which the Judge did not think it necessary to refer in his judgment.]

[102]

Mr. Bethell, in reply :

* * *Harvey v. Clayton* (3) is directly in point; and there is no ground for impugning its authority, which has been lately recognised by Lord BROUGHAM in *Greenough v. Gaskell* (4). * * *

[*103]

The LORD CHANCELLOR, in the course of the argument, observed, that it was an ordinary part of a solicitor's duty to lay out money for his clients; and that if the discovery in question could not be given without a breach *of professional confidence, no inconvenience which the plaintiff might be put to by the want of it, could be a reason for compelling the defendant to give it.

At the conclusion of the argument, his Lordship said he was of opinion, upon the authority of *Harvey v. Clayton* (3), that the defendant could not be compelled to state the names of his clients. The case in question stood on stronger grounds than those in which the protection was given for the sake of the party himself: here the privilege being that of the client, the defendant had no right to answer the questions.

As to the form in which the objection had been taken, his Lordship said he thought it was competent to the defendant to take it by answer; and that, if it had been called to the attention of the Vice-Chancellor, that there were several exceptions to the rule that a defendant who answers at all must answer fully, and that the present case formed one of those exceptions, his Honour would probably have come to a different conclusion.

The VICE-CHANCELLOR's order was accordingly reversed, and the exceptions to the report allowed.

1841,
Feb. 11, 13.
1842.
Nov. 11.

ALLEN v. MACPHERSON.

(1 Phillips, 133—146; S. C. 12 L. J. Ch. 97; 7 Jur. 49; affd. 1 H. L. Cas. 191; 11 Jur. 785.)

Lord
LYNDHURST.
L.C.

[133]

[SEE the report of this case on appeal to the House of Lords in 1 H. L. C. 191, to be contained in a later volume of the Revised Reports.]

(1) 41 R. R. 133 (3 My. & K. 572).

(2) 19 R. R. 63 (2 Swanst. 194).

(3) 19 R. R. 66 (2 Swanst. 221, n.).

(4) 36 R. R. 258 (1 My. & K. 98).

QUARRIER *v.* COLSTON.

(1 Phillips, 147—152; S. C. 12 L. J. Ch. 57; 6 Jur. 959.)

Money won at play, or lent for the purpose of gambling, in a country where the games in question are not illegal, may be recovered in the Courts of this country.

THE bill in this cause, which was filed by the plaintiff as personal representative of G. W. Tobin deceased, prayed that a memorandum of debt which had been given by the deceased, shortly before his death, to the defendant, might be delivered up to be cancelled; and that the defendant might be restrained from proceeding with an action which he had commenced against the plaintiff, for the recovery of the sum mentioned in that memorandum.

The memorandum was in these words:

“I, George Webb Tobin, owe J. M. Colston, Esq., 525*l.* money received. G. W. TOBIN.”

The bill alleged that the memorandum was given by Tobin when in a state of intoxication, and that it was wholly or in great part made up of sums which the defendant had either won from Tobin at cards, or which he had lent to him for the purpose of gaming, while they were upon a tour together on the Continent. And after setting forth a correspondence which had taken place between the plaintiff and the defendant since the death of Tobin, in which the defendant had admitted that a considerable part of the demand was of that nature, the bill charged amongst other things, that the defendant had always refused to state the particulars of the amount for which the memorandum was given, and that he ought to set forth when and where, and in whose presence, and on what account &c., the *consideration for the said memorandum and every part thereof was paid; and that without such discovery the plaintiff could not safely proceed to trial in the action.

The defendant by his answer stated that the memorandum had been given by Tobin when perfectly sober, upon the occasion of a settlement of accounts which had been come to between them shortly after their return from abroad; that the greater part of the sum in question, was due to him on account of the travelling expenses, of which he had paid more than his equal share; that about 25*l.*, other part of it, had been won by him from Tobin, at different times in the course of the tour, at cards, but in sums of less than 10*l.* at a sitting; and that the rest, but to what amount he could not tell, was due for monies lent by him to Tobin at the

1842.

May 9.
June 21.SHADWELL,
V.-C.On Appeal.
Nov. 8.Lord
LYNDHURST,
L.C.

[147]

[*148]

QUARRIER
 t.
 COLSTON.

public tables at Baden Baden and other places in Germany, and had been employed by Tobin in gaming at such public tables. That, further than that, he could give no account of the particulars of his demand, inasmuch as he had delivered up all the memorandums and vouchers relating thereto to Tobin, when the settlement of accounts took place, at which the memorandum in question was given.

The VICE-CHANCELLOR OF ENGLAND having granted an injunction upon payment of 525*l.* into Court, the defendant moved by way of appeal, before the Lord Chancellor, to discharge his Honour's order.

[149]

Mr. Wakefield and *Mr. Bilton*, in support of the appeal motion, [cited *Cannan v. Bryce* (1) and other cases referred to in the judgment]:

It does not appear, nor does the bill even allege, that the games for which this money was lent were illegal in the country where the loans were made, and, if not, why should not the money be recovered? The real object of the bill is to open a settled account: but that cannot be done without alleging and proving some item to be improper.

[150]

Mr. Bethell and *Mr. Austen*, *contrà*, [cited *M'Kinnel v. Robinson* (2)]:

If the claim is to be enforced in this country, the debt must be shown to be a legal debt according to the law of this country.

Mr. Wakefield, in reply.

Nov. 8.

THE LORD CHANCELLOR:

I do not perceive in this case any sufficient ground for restraining the defendant from proceeding in his action at law. The memorandum is *primâ facie* evidence of the debt, and there is nothing either in the defendant's answer, or to be collected from the correspondence, showing that the consideration of the claim was illegal.

The defendant and the testator travelled together on the Continent. They agreed to divide their expenses; the defendant paid more than his proportion, and the difference constitutes a part of the debt. With respect to this, no objection has been made.

Another part of the debt consisted, as stated in the answer, "of money lent to the testator when he was playing at the public tables at Baden Baden, and other places in Germany, which money was employed by him *in gaming at such public tables." What ground

*151]

(1) 22 R. R. 342, see p. 345 (3 B. & Ald. 179, see p. 184). (2) 49 R. R. 672 (3 M. & W. 434).

is there for saying that this cannot be recovered? First, it does not appear what the games were, or that they would have been illegal even in England; and until the late case of *M'Kinnel v. Robinson*, in the Court of Exchequer, it had always been supposed, and there are several decisions to that effect, that though securities given for money lent to play at certain games were void by the statute of Anne, yet that the money itself might be recovered: *Barjeau v. Walmsley* (1), *Robinson v. Bland* (2), *Wettenhall v. Wood* (3). But in the case to which I have referred of *M'Kinnel v. Robinson*, it was held, and I think properly held, that money lent to play at an illegal game could not be recovered. This was decided on the principle that money lent for the purpose of enabling the party to do an illegal act, and this with the knowledge of the lender, could not be made the foundation of an action. But this rule does not apply to the present case. For there is nothing to show that the public gaming tables where the money was lent were not lawful in the countries where they were held: on the contrary, the presumption is, that, as they were public, they were lawful; and if we might import our private knowledge into a case of this nature, (upon which, however, I do not mean to rely,) it is notorious that they are, in several places in Germany, sanctioned by the Government, which receives a rent from the persons by whom they are kept. The LORD CHIEF BARON of the Exchequer, in giving judgment in the case of *M'Kinnel v. Robinson*, observes as to *Robinson v. Bland* (in which it was held that money lent to play with might be recovered), that the money was not lent to play at an illegal game, gaming not being unlawful in *France, where the loan was made. It does not appear therefore to me, that there is any thing to prevent the defendant from recovering in respect of this part of the debt in his action at law.

The only remaining portion of the sum is the small amount stated to have been won at cards. It has not been shown that this was an illegal transaction. There is nothing to show that it was illegal by the laws of the country where the money was won, and it would not have been illegal here; for the defendant, in his answer, states that he did not win so much as 10*l.* at any single sitting: and it has been decided in more than one case, that a sum under 10*l.*, won at cards, may be recovered: *Bulling v. Frost* (4).

As the memorandum, therefore, affords *primâ facie* evidence of

QUARRIER
r.
COLSFON.

[*152]

(1) 2 Str. 1249.

(2) 2 Burr. 1077.

(3) 1 Esp. 18.

(4) 1 Esp. 235.

QUARRIER
v.
COLSTON. the debt, and as there is nothing to show that any part of it is founded upon an illegal consideration, I see no reason why this Court should interfere, or why the defendant should not be allowed to prosecute his action.

M'FADDEN v. JENKYNs.

1842.
June 21, 22.

WIGRAM,
V.-C.

On Appeal.
Nov. 4.

Lord
LYNDHURST,
L.C.
[153]

(1 Phillips, 153—158; S. C. 12 L. J. Ch. 146; 7 Jur. 27; affg. 1 Hare, 458; 11 L. J. Ch. 281; 6 Jur. 501.)

A verbal direction by a creditor for his debtor to hold the debt in trust for a third person constitutes a valid equitable assignment of the debt by way of trust.

In the month of February, 1841, Thomas Warry lent the sum of 500*l.* to the defendant Jenkyns. In the month of December following Thomas Warry died, and the defendant George Warry having shortly afterwards, as his personal representative, brought an action against Jenkyns to recover the 500*l.*, this bill was filed, alleging that the money was originally intended to be repaid in a short time, but that soon after the loan had been made, Thomas Warry sent a verbal message to Jenkyns by one Bartholomew, a common friend of their's, desiring him no longer to consider the money as due to him, Thomas Warry, but to hold it "upon trust for the plaintiff, to be at her absolute disposal, for her own use and benefit." That Bartholomew delivered the message, and Jenkyns accepted the trust; and that the transaction was communicated to the plaintiff both by Thomas Warry and by Jenkyns, and that Jenkyns, afterwards, during the lifetime of Warry, and with his knowledge, paid to the plaintiff the sum of 10*l.* in part execution of the trust; and that Thomas Warry had never afterwards demanded payment of the money or any part of it.

The bill prayed, that it might be declared that, under those circumstances, Jenkyns became and was a trustee of the 500*l.* for the plaintiff, and that he might be decreed to pay the 490*l.* residue thereof, to the plaintiff, and that the defendant George Warry might be restrained *from further proceeding in his action against Jenkyns.

The case made by the bill was verified by the affidavits of the plaintiff, Bartholomew, and Jenkyns, and upon those affidavits Vice-Chancellor WIGRAM granted an injunction to restrain the prosecution of the action until the hearing of the cause, the plaintiff submitting to pay the 500*l.* into Court.

The defendant George Warry now moved, by way of appeal,

before the Lord Chancellor, that the VICE-CHANCELLOR's order might be discharged.

M'FADDEN
v.
JENKYNs.

Mr. Wakefield and *Mr. Kenyon*, in support of the appeal motion :

If the alleged message from Thomas Warry to Jenkyns amounted to a complete gift, or an effectual release of the debt, Jenkyns has a good defence to the action ; if it did not, no trust could be declared upon it which this Court will enforce in favour of a volunteer. [They cited *Colman v. Sarrel* (1), *Ellison v. Ellison* (2), *Autrobus v. Smith* (3), *Pulvertoft v. Pulvertoft* (4), *Ex parte Pye* (5), and other cases.]

Mr. Sharpe and *Mr. G. Russell* [cited *Collinson v. Patrick* (6) and *Wheatley v. Purr* (7)] :

[155]

The plaintiff's case is, that the message to Jenkyns constitutes no defence to the action, but that it does constitute a complete declaration of trust, which this Court will enforce even at the instance of a volunteer.

Mr. Wakefield, in reply. * * *

THE LORD CHANCELLOR:

Nor. 4.

[157]

This was an appeal from a judgment of Vice-Chancellor WIGRAM, upon a motion for an injunction to stay proceedings at law. The facts stated in support of the motion were shortly these. The testator Thomas Warry had lent a sum of 500*l.* to the defendant Jenkyns, to be returned within a short period. Some time afterwards Warry sent a verbal direction to Jenkyns to hold the 500*l.* in trust for Mrs. M'Fadden. This he assented to, and, upon her application, paid her a small sum, 10*l.*, in respect of this trust. The main question was, whether, assuming the facts to be as stated, this transaction was binding upon the estate of Thomas Warry. The executor had brought an action to recover the 500*l.* so lent to Jenkyns. It is obvious that the rights of the parties could not, with reference to this claim, be finally settled in a court of law ; and, if the trust were completed and binding, an injunction ought to be granted.

Some points were disposed of by the VICE-CHANCELLOR in this

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| (1) 1 R. R. 83 (1 Ves. Jr. 50). | p. 99). |
| (2) 6 R. R. 19 (6 Ves. 656). | (5) 11 R. R. 173 (18 Ves. 140). |
| (3) 8 R. R. 278 (12 Ves. 39). | (6) 44 R. R. 207 (2 Keen, 123). |
| (4) 11 R. R. 151 (18 Ves. 84 ; see | (7) 44 R. R. 112 (1 Keen, 551). |

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[*158]

case, which are indeed free from doubt, and appear not to have been contested in this Court, viz. that a declaration by parol is sufficient to create a trust of personal property; and that if the testator Thomas Warry had, in his lifetime, declared himself a trustee of the debt for the plaintiff, that, in equity, would perfect the gift to the plaintiff as against Thomas Warry and his estate. The distinctions upon this subject are undoubtedly refined, but it does not appear to me that there is any substantial difference between such a case and the present. The testator, in directing Jenkyns to hold the money in trust for the plaintiff, which was *assented to and acted upon by Jenkyns, impressed, I think, a trust upon the money which was complete and irrevocable. It was equivalent to a declaration by the testator that the debt was a trust for the plaintiff.

The transaction bears no resemblance to an undertaking or agreement to assign. It was in terms a trust, and the aid of the Court was not necessary to complete it. Such being the strong inclination of my opinion, and corresponding, as it appears to do, with that of the learned Judge in the Court below, and with the decision of the MASTER OF THE ROLLS in the case to which he refers, I cannot do otherwise upon this motion, and in this stage of the cause, than refuse the application.

I must not, however, be understood as pronouncing any conclusive opinion upon the facts of the case. The witness Bartholomew, a professional gentleman, I believe, swears distinctly and in positive terms as to the direction given by the testator; but there are some improbabilities in the case, and it is difficult to say, as the VICE-CHANCELLOR justly observes, what may be the result at the hearing of the cause. As the appeal appears to have been encouraged, if not suggested by the VICE-CHANCELLOR, the motion must be refused without costs.

1842.

Nov. 9.

Lord
LYNDHURST,

L.C.

[159]

IN THE MATTER OF JAMES WALTER THOMAS AND SARAH THOMAS.

(1 Phillips, 159—163; S. C. 3 Mont. D. & D. 40; 12 L. J. Ch. 59; 6 Jur. 979.)

An innkeeper, who was a widow, having died intestate, two of her children, a son and daughter, took possession of her furniture and stock in trade, and carried on her business in their own names for two years after her death, during which time they paid her funeral expenses and some of her debts, but without taking out administration to her estate, and, at the end of that time, became bankrupts, the daughter having a few months

previously retired from the business, and sold her share of it to the son. Another of the children then took out administration to the intestate, and claimed that part of her furniture and stock in trade which still remained in specie; but, Held that it belonged to the assignees, 'as having been in the order and disposition of the son at the time of his bankruptcy.

In re
THOMAS.

THIS was an appeal, in the form of a special case, from the Court of Review.

The material facts, stated in the case, were as follows :

Susannah Thomas, the mother of the bankrupts, kept an hotel in Bristol from the year 1835 until the 14th of July, 1838, when she died intestate, leaving the bankrupts and two other children her only next of kin. Upon her death the bankrupt Sarah Thomas, who had up to that time lived with her and assisted her in the hotel, remained in possession of her estate and effects, including the stock and property in the hotel, and continued to carry on the business for about two months, at the expiration of which time by an agreement between her and the bankrupt James Walter Thomas, who had theretofore carried on the posting business of the hotel separately and on his own account, the two businesses were united, and were thenceforth carried on by the bankrupts in partnership together down to the month of April, 1840, when J. W. Thomas being about to be married, it was agreed between him and Sarah Thomas that she should sell and relinquish to him all her right and interest in the business, and in the stock and effects then employed in it, for the sum of *875*l.*; and thereupon Sarah Thomas retired from the place where the partnership business was carried on, and a notice of the dissolution of the partnership was duly published in the *London Gazette*, and in the Bristol newspapers; and the name of Sarah Thomas, which had been painted on the front of the house where the partnership business had been carried on, was erased, and the name of James Walter Thomas alone remained. From that time until the *fiat* issued, James Walter Thomas remained in the sole possession of the stock and effects in the hotel, the greater part of which had belonged to the intestate, the rest having been added by himself and his sister since their mother's death.

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The funeral expenses of the intestate and several of her debts were, after her death, paid partly by Sarah Thomas, and partly by Sarah Thomas and James Walter Thomas while they were in partnership; but no claim was made, by or on the part of any other of the next of kin of the intestate, to any part of her estate or effects, until after the issuing of the *fiat*. The *fiat* issued on the

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14th of October, 1840, and amongst other property then in the possession of J. W. Thomas, and which was sold by the assignees, was that part of the stock and effects in the hotel which had formerly belonged to the intestate, amounting in value to about 1,060*l*.

On the 10th December, 1840, one of the other children of the intestate took out letters of administration to her estate; and, having done so, he presented a petition to the Court of Review, praying that the assignees might account for, and pay over to him, the value of that part of the property and effects so sold by them, which had formerly belonged to the intestate. And the Court of Review made an order accordingly.

[161] The special case, which was stated at the instance of the assignees, now came on to be argued.

Mr. Russell and *Mr. Bacon*, for the assignees, [cited *Fox v. Fisher* (1), *Ray v. Ray* (2), *Farr v. Newman* (3), and *M'Leod v. Drummond* (4)].

Mr. Swanston and *Mr. Osborn*, *contra* :

[162] * * In *Fox v. Fisher*, it did not appear, as it did in the present case, that the party in possession of the goods had paid any of the intestate's funeral expenses and debts, or otherwise dealt with them in the character of a trustee. That was one material circumstance which distinguished the two cases. Another circumstance, which applied both to *Fox v. Fisher* and *Ray v. Ray*, was the length of time during which the party had continued in possession of the goods. In *Fox v. Fisher* it was eleven years; in *Ray v. Ray* between six and seven years; whereas, in the present case, it was only two.

THE LORD CHANCELLOR :

I do not think that makes any difference; two years bring it within the principle.

Mr. Russell, in reply.

THE LORD CHANCELLOR :

I think this is not a case of trustee at all. The parties have been in possession of the property as wrong-doers. First, the daughter takes possession and carries on the business; after carrying it on for about two months she admits her brother into partnership, and

(1) 22 R. R. 324 (3 B. & Ald. 135).

(3) 2 R. R. 479 (4 T. R. 621).

(2) 14 R. R. 255 (G. Cooper, 264).

(4) 11 R. R. 41 (17 Ves. 152).

they carry it on in their joint names for a certain time. Then another transaction takes place between them. The daughter sells her share to her brother, and retires from the business. From the beginning to the end, they deal with the property as their own. The mere circumstance of their having, in a few instances, paid debts *of the intestate, is entitled to very little weight; for, probably, the object was, merely to quiet the claims of other persons who might have disturbed their possession. This brings the case, therefore, strictly within that of *Fox v. Fisher*, decided some years ago. The judgments of the CHIEF JUSTICE and of Mr. Justice BAYLEY state distinctly the grounds of that decision. And as it is desirable that the law should be uniform, and as I am satisfied with the grounds assigned for the decision in that case, I think the judgment of the Court below in this case must be reversed.

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SHIRLEY v. EARL FERRERS (1).

(1 Phillips, 167—172; S. C. 12 L. J. Ch. 111; 6 Jur. 1047.)

A testator devised certain estates to the use of trustees for the term of 500 years, and, subject thereto, to the use of other trustees, to preserve contingent remainders, with remainder to the first and other sons of C. S. (then an infant), with divers remainders over, and he directed that the trustees of the term should, after paying certain annuities, apply so much of the rents and profits of the estates as they should think fit (not exceeding in any one year a certain amount), in aid of another fund, to the maintenance and education of C. S., until she should attain twenty-one or marry, and that they should accumulate the surplus rents and profits for the benefit of C. S. when she should attain twenty-one or marry, and if she should die under twenty-one and unmarried, then for the benefit of the parties entitled under the subsequent limitations of the estates, and that upon her attaining twenty-one or marrying, they should, during her lifetime, pay the surplus rents, after payment of the annuities, to her for her separate use:

Held, that the sums annually applied out of the rents and profits, under the trusts of the term, to the maintenance and education of C. S. until her marriage were not liable to legacy duty.

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April 16.
Dec. 9.

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EARL FERRERS being entitled in fee simple to considerable real estates in Leicestershire and elsewhere, made his will, dated the 12th of April, 1827, by which, amongst other things, he devised his Leicestershire estates to the use of certain trustees for a term of 500 years, and, subject thereto, to the use of other trustees, during the life of Caroline Shirley, then an infant of the age of eight years, the reputed daughter of his late son Robert, Viscount Tamworth, on

(1) Distinguished, *In re De Hoghton* [1895] 2 Ch. 517; affirmed [1896] 1 Ch. 855, 65 L. J. Ch. 528, 74 L. T. 297.—C. A.

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FERRERS.

trust to preserve contingent remainders, with remainder as to all the said estates (except certain portions) to the use of the sons and daughters of the said Caroline Shirley successively in tail, with divers remainders over, and ultimately to the use of the testator's right heirs; and, as to the excepted portions, to the use of the daughters of Caroline Shirley, (other than the eldest who under the previous limitations should become entitled to the other Leicestershire estates) as tenants in common in fee, with cross limitations between such daughters, in the event of any of them dying under twenty-one and unmarried; and in case there should be no such daughter who should attain twenty-one or marry under that age, then to the same uses as were before limited of the rest of the Leicestershire estates.

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The testator then directed the trustees of the term of 500 years, out of the rents and profits of the said estates, to pay and satisfy certain annuities, and, until Caroline Shirley should attain twenty-one or marry under that age, to keep the testator's mansion-house at Radcliffe-upon-Wreke in repair, and also to pay the rent, rates, taxes, and other outgoings of his other mansion-house at Craven Hill (which was leasehold); and, in aid of the funds thereafter provided for the like purpose, to apply so much of the rents and profits of the said estates, not exceeding in the whole in any one year (including the rent, taxes, and other outgoings of the house at Craven Hill) the sum of 2,000*l.*, as the trustees should in their discretion think fit, in the clothing, maintenance, and education of the said Caroline Shirley, fitting and suitable to the fortune she would possess; and to invest, and accumulate the interest of, the surplus rents of the said estates, after answering the purposes aforesaid, until she should attain twenty-one or marry under that age; and upon the happening of either of those events, to stand possessed of the accumulations and the securities on which the same should then be invested, upon such trusts and for such purposes as she should by deed or will appoint; and in default of such appointment, in trust for her absolutely; provided always, that if she should die under twenty-one and without having been married, the trustees were to stand possessed of the accumulations so to be made, and the securities on which the same should be invested, on trusts corresponding as nearly as might be to the uses before limited of the Leicestershire estates, except those of the term of 500 years. And after Caroline Shirley should have attained twenty-one or married, the same trustees were during her

lifetime to pay the surplus rents after answering the said annuities, to her, for her separate use.

In a subsequent part of his will, after devising certain real estates in Staffordshire in trust for sale, and directing the proceeds, together with his residuary personal estate, to be accumulated for the benefit of Caroline Shirley when she should attain twenty-one or marry under that age, with a like limitation over as before mentioned, in the event of her dying under that age unmarried, the testator devised other freehold and copyhold estates to other trustees, upon trust for the said Caroline Shirley, when she should attain twenty-one or marry under that age, in fee; with a direction to the said trustees in the meantime, until she attained twenty-one or married, to pay and apply the rents and profits of those estates to her maintenance and education, as they should think fit.

The testator died shortly after the date of his will; and after his death this suit was instituted for the purpose of administering the trusts of his will, and making Miss Shirley a ward of the Court.

On the 26th of August, 1837, Miss Shirley, being then eighteen years of age, intermarried with Don Lorenzo, Duke Sforza Cesarini.

After all other legacy duties which became payable under the will had been duly paid, a claim was made on the part of the Crown, for payment of legacy duty at the rate 10 per cent., upon the amount of the rents and profits which had been annually applied under the trusts of the term, to the maintenance and education of Miss Shirley previously to her marriage, and also upon the accumulations of the surplus rents during the same period, on the ground that those rents and profits and accumulations were in the nature of an annuity or legacy (1) *charged upon the testator's real estates. That claim having been resisted by the executors, the Commissioners of Stamps and Taxes, with a view to bring the question to an issue, put a stop upon the dividends of a sum in Court, constituting part of the testator's residuary estate, to the

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(1) The enactments upon which the claim was founded are contained in the third part of the schedule to the 55 Geo. III. c. 184, in which, after imposing certain duties upon every legacy of the amount of 20*l.* or upwards, given out of the testator's personal estate, or out of or charged upon his real or heritable estate, or

out of any monies to arise by sale, mortgage, or other disposal of his real or heritable estate, or any part thereof, it is declared that all gifts of annuities or by way of annuity, or of any other partial benefit or interest out of any such estate or effects as aforesaid, shall be deemed legacies within the intent and meaning of that schedule.

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income of which the Duchess was intitled for life, under the settlement made on her marriage, to her separate use.

The Duchess, thereupon, presented a petition praying a declaration that legacy duty did not attach upon the rents in question, and that the stop might accordingly be removed.

The petition now came on to be heard before the Lord Chancellor, all parties consenting to be bound by his Lordship's decision. The argument was confined to the amount of the rents which had been applied to the maintenance and education of the petitioner, there having been, in fact, no surplus to accumulate.

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Mr. Purvis and *Mr. Bagshawe*, for the petitioner, and *Mr. Bethell* and *Mr. Stinton*, for the Duke, who was interested in the fund under the marriage settlement, contended that a trust of this kind, for the maintenance of an infant out of the rents and profits of real estate, *of which, subject to the trust, she was herself tenant for life, was merely a qualified form of ownership or enjoyment of the land itself, and not a "partial benefit or interest out of" the land, and that the intention of the Act was, to impose a duty upon those gifts only which were purely pecuniary, and which were charged upon land devised to another person. *The Attorney-General v. Jackson* (1) and *Pickard v. The Attorney-General* (2), were both cases of that kind, and, in that respect, clearly distinguishable from the present.

Mr. Elderton, appeared for the trustees.

Mr. Twiss and *Mr. Romilly*, for the Crown, contended that it was immaterial whether the trust was, to apply a certain sum out of the rents and profits, or a certain portion of the rents and profits themselves: the expressions were of equivalent import, and either of them amounted to a gift, "by way of annuity," of a certain sum out of the income of the estate, or, at all events, to "a partial benefit or interest out of the estate." The cases cited on the other side showed that if the allowance for maintenance, under the trusts of the term, had stood alone and uncoupled with a collateral interest in the land, under other parts of the will, it would have been liable to legacy duty. But if that were so, what amount, it might be asked, of such collateral interest in the land was sufficient to take away the right of the Crown? would the devise of a single farm or even of a single acre be enough?

(1) 37 R. B. 641 (2 Cr. & J. 101),

(2) 6 M. & W. 348,

THE LORD CHANCELLOR (without hearing a reply) :

The effect of the will is to give the petitioner a life estate subject to certain charges, and coupled with a *direction to the trustees to apply a limited portion of the rents to her maintenance and education until she attain the age of twenty-one or marry. The direction merely does what this Court would have done without it. The petitioner would have been entitled at all events to maintenance out of the rents and profits of the real estates. It is true, the trustees have a discretion to allow a portion of the rents, not exceeding a certain amount, for that purpose : but still the estate out of which the allowance is to come is her estate. Nothing but what is a charge upon the estate of another person will come within the statute. It is very important that, as far as possible, we should avoid refinements in the construction of this Act. I am of opinion that no legacy duty is payable, and the stop must be taken off.

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BESCH v. FROLICH (1).

(1 Phillips, 172—176; S. C. 12 L. J. Ch. 118; 7 Jur. 73.)

On a bill to dissolve a partnership, on the ground of the lunacy of a partner, the Court will not make its decree retrospective, even to the filing of the bill, still less to the time when the defendant first became incapable of attending to the business.

On the 9th of December, 1824, the plaintiff and defendant entered into partnership in the business of tailors, for a term of twenty-one years, subject to be determined, at the option of either party, at the expiration of fourteen years. The capital, consisting of 1,000*l.* was contributed in equal moieties, and the deed of co-partnership contained the usual covenant by both parties, that they would respectively at all times, during the continuance of the partnership, employ themselves diligently in promoting the interests of the concern ; in addition to which there was a special covenant by the plaintiff (who had, for some years previous to the formation of the partnership, acted as foreman to the defendant's father in the same trade) that he would wholly and exclusively devote his time and attention to the *business, and use his best endeavours to promote the prosperity of the same for the benefit of himself and the defendant.

In the month of November, 1837, a commission of lunacy issued

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(1) *Helmore v. Smith* (1836) 35 Ch. D. 436, 443, 56 L. J. Ch. 145, 56 L. T., 72.

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against the defendant, under which he was found to have been of unsound mind, and incapable of managing his affairs, from the 28th of October, 1834: whereupon the plaintiff, in the month of December, 1837, filed his bill, stating that the defendant had since the spring of the year 1834, in consequence of his malady, absented himself from, and taken no part in the management of the business, and praying that the partnership might be declared to have been dissolved, as from that time.

A formal answer was put in by the committee of the lunatic, submitting his rights to the protection of the Court, and the plaintiff went into evidence as to the time at which the defendant had become incapable of attending to the business.

The cause was heard as a short cause before the VICE-CHANCELLOR OF ENGLAND on the 24th of May, 1839, when his Honour, by his decree, amongst other things, declared the partnership dissolved from the 1st of May, 1834, from which time it was proved by evidence in the cause that the defendant had, by reason of his unsoundness of mind, been unable to attend to or assist in the partnership business.

In the month of December, 1841, when considerable progress had been made in taking the accounts under that decree, an appeal, against the above-mentioned part of it, was presented, on behalf of the defendant, under the sanction of the LORD CHANCELLOR in lunacy.

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The appeal now came on to be heard.

Mr. Swanston and Mr. Tennant, for the appellant :

The Court will not make a retrospective decree for a dissolution of partnership on the ground of lunacy ; for the lunacy of a partner is not, *ipso facto*, a dissolution of the partnership, as bankruptcy is, but only a ground for applying to a court of equity to determine the contract, on the ground that one of the parties has become unable to fulfil it: *Huddleston's case* (1), *Sayer v. Bennet* (2), *Jones v. Noy* (3) ; and as it is the decree of the Court which dissolves the partnership, the date of the dissolution ought to be the date of the decree. It is true, that in *Kirby v. Carr* (4), which will perhaps be relied on by the other side, a partnership was, under similar circumstances, declared to have been dissolved as from the filing of

(1) Cited 2 Ves. Sen. 35.

(4) 50 R. R. 322 (3 Y. & C. Ex. Eq.

(2) 1 Cox, 107. See 13 R. R. 98, 99. 184).

(3) 39 R. R. 160 (2 My. & K. 125).

the bill: but the point does not appear to have been argued, and the decree was probably not opposed.

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Mr. Stuart and Mr. Bacon, for the respondent :

It is immaterial whether the lunacy of a partner is or is not *ipso facto* a dissolution of the partnership, for if it incapacitates one of the partners for the performance of his part of the contract, this Court, which acts on the assumption that what ought to have been done has been actually done, will decree a dissolution from the time when the incapacity commenced.

(THE LORD CHANCELLOR: How can that be? Suppose the plaintiff became insolvent. The lunatic would be bound, notwithstanding this retrospective decree, to pay the partnership debts contracted during the time *that the business continued to be carried on in the joint names. Besides it must be remembered that there are three considerations between partners. The share of each in the capital; the share of each in the good will; and the labour which each undertakes to devote to the business. Your argument is, that because one of these considerations—and that, perhaps, the least valuable of the three—fails, you are entitled from that time to take to yourself the whole benefit of the other two; and that too, while your partner remains jointly liable for the debts of the partnership during the intermediate period. How can that be right? it would be contrary to all principles of justice.)

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* * * * *

If the Court has a discretion in fixing the time of the dissolution, it is a material circumstance in this case that the bill was filed immediately on the defendant's being found lunatic by inquisition, and also, that the decree was never complained of until the accounts had been gone into, and it had been ascertained that a later dissolution would be more for the defendant's benefit.

THE LORD CHANCELLOR (without waiting for a reply) :

Whatever delay has occurred is imputable to the plaintiff himself; it was competent to him to have filed *his bill at any moment since the time when his partner first became incapable of attending to the business: but he chose to lie by for several years, and having during that time had the benefit of his partner's share of the capital and good will, he cannot now say that the partnership is to be dissolved as from the time when the insanity commenced: for,

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what a hardship it would be if the plaintiff were to take all the profits which have since accrued from the defendant's share of the partnership property, while the defendant remained, during all that time, liable to the losses.

Upon the other question, whether the dissolution ought to be from the filing of the bill or from the date of the decree, I have felt some doubt, but upon consideration I think it ought to be from the date of the decree—that is, of the decree below. As between the partners themselves, indeed, there is no reason why it should not be from the filing of the bill; but as regards third parties, the dissolution does not take place until it is declared by the Court; and therefore the hardship and inconvenience of a retrospective dissolution, to which I have already adverted, would apply to that interval as well as to the interval between the commencement of the insanity and the filing of the bill. I think, therefore, that the partnership must be declared to have been dissolved as from the date of the VICE-CHANCELLOR'S decree, and that the decree must be varied accordingly.

HODSON *v.* BALL(1).

(1 Phillips, 177—184; S. C. 12 L. J. Ch. 80; 7 Jur. 475; affg. 11 Sim. 456.)

1842.
May 9.
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V.-C.
On Appeal.
Dec. 22.
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L.C.
[177]

The province of a supplemental bill in aid of a decree is merely to carry out and give fuller effect to that decree, and not to obtain relief of a different kind, and on a different principle; the latter being the province of a supplemental bill in the nature of a bill of review, which cannot be filed without the leave of the Court. And therefore, where, in a suit for the execution of the trusts of a will, the original bill had prayed, and the decree had directed, merely the common accounts against the executors, and the plaintiff afterwards filed a supplemental bill, without the leave of the Court, alleging that in taking the accounts in the Master's office he had discovered for the first time that the executors had been guilty of misconduct, and praying relief against them in respect of their wilful neglect and default; the supplemental bill was ordered to be taken off the file for irregularity.

JOHN HODSON, the testator in the cause, by his will devised and bequeathed all his real and personal estate, after payment of his debts, to his wife Elizabeth Hodson, and John Ball and Robert Richardson, upon trust to pay an annuity of 80*l.* to his wife during

(1) And so since the Judicature Acts a plaintiff who has only sought and obtained the common judgment against a legal personal representative cannot maintain a subsequent action against the same defendant charging

him with wilful neglect or default unless he has obtained the leave of the Court to bring the action: *Laming v. Gee* (1878) 10 Ch. D. 715, 48 L. J. Ch. 196, 40 L. T. 33.—O. A. S.

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her life, and to divide the remainder of the income equally among his children who should survive him, and the lawful issue of such as should be dead at the time of his decease: and he directed that his wife should be the sole guardian of his children, and have the sole management of his estate, and receive and collect the rents and profits thereof, in order to save, as much as possible, his other trustees the trouble of so doing; but he also directed that the other trustees should annually investigate the widow's accounts, for the satisfaction of all parties concerned.

The testator died in the year 1815, leaving a numerous family, and his will was shortly afterwards proved by his widow and the two other executors therein named. The widow died in the year 1892, and in the year 1895 the original bill in this cause was filed by one of the testator's sons against Ball and Richardson, and the personal representative of the widow, and other parties, in which, after stating that all the three executors *had, in the month of February, 1816, proved the will and undertaken the trusts thereof, and that the widow had with the knowledge and concurrence of her co-trustees, entered into the possession of the testator's personal estate, and into the receipt of the rents and profits of his real estate, it was alleged that she had during her lifetime wasted and misapplied the assets; but the bill contained no charge of default against the other executors, and it prayed merely the usual account of their receipts and payments, in respect of the testator's estate, since the decease of the widow, with the usual account, against her representative, of what was due from her to the estate at the time of her death. And at the hearing, in the year 1839, a decree was made accordingly.

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The defendant Richardson having afterwards died, it became necessary to revive the suit against his personal representative; but instead of filing an ordinary bill of revivor for that purpose, the plaintiff, in the month of July, 1841, filed a bill of revivor and supplement against the personal representatives of Richardson and the surviving parties to the original suit, charging, by way of supplement, that since the accounts of the executors had been brought into the Master's office, the plaintiff had for the first time discovered that Ball and Richardson had, as well during the lifetime of Elizabeth Hodson as since her decease, repeatedly interfered and acted in the trusts of the will and in the management of the trust estate, and were privy to and cognizant of all her dealings in relation thereto; and further charging, that in taking the accounts

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before the Master, it appeared, as the fact was, that Ball and Richardson had connived at the widow's misappropriation of the trust property, and had been guilty of great negligence in the investigation of her accounts, having signed them on three occasions *only during her lifetime; but that, by reason of the defective nature and frame of the decree in the original suit, it was not competent for the plaintiff to charge the defendant Ball and the executors of Richardson, as they ought to be charged, with the loss which the trust estate had sustained through their misconduct: and after the usual prayer of revivor against the personal representative of Richardson, the bill prayed, amongst other things, that Ball and the estate of Richardson might be declared liable for, and be charged with, such sums as, but for their wilful neglect and default, might have been received by them in respect of the trust estate, either during the lifetime of Elizabeth Hodson or since her death.

That bill having been filed without the leave of the Court, the defendant Ball moved, before the VICE-CHANCELLOR OF ENGLAND, that it might be taken off the file for irregularity, and his Honour made an order accordingly.

The plaintiff now moved, by way of appeal before the Lord Chancellor, to discharge that order.

Mr. Wakefield and Mr. Mylne, appeared in support of the motion.

Mr. Richards and Mr. Phillips, *contra*.

The several points raised in the argument, and the authorities cited, on both sides, are fully discussed in the judgment.

Dec. 22.

THE LORD CHANCELLOR:

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This was a motion to discharge an order of the VICE-CHANCELLOR, by which he directed a supplemental bill to *be taken off the file, on the ground that he considered it to be a supplemental bill in the nature of a bill of review, and that it had been filed without the permission of the Court.

The original bill was, as far as related to three of the defendants, a bill calling on them, as executors and trustees, to account; and an account was decreed against them in the common form. The supplemental bill stated, that after the decree had been carried into the Master's office, it was discovered, for the first time, that the trustees had greatly misconducted themselves in the management

of the affairs of the trust, and it accordingly prayed, that they might account for what, except for their wilful neglect and default, might have come to their hands. So that the decree prayed for by the supplemental bill was essentially different from the decree pronounced by the VICE-CHANCELLOR upon the original bill.

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BALL.

On this ground it was insisted that the bill ought to be taken off the file, it having been filed without the permission of the Court. In answer to that it was said that the bill was not a supplemental bill in the nature of a bill of review, but a supplemental bill in aid of a decree; and a passage from Mitford's Treatise on Pleading was referred to, in which it is stated that a supplemental bill may be filed in aid of a decree, in order that it may be carried fully into execution (1). Now there is no doubt of the correctness of that position, but the question is, what is the province of a supplemental bill in aid of a decree? I apprehend that a supplemental bill in aid of a decree cannot vary the principle of the decree. Its province is, to carry out the principle of the decree; to give full and complete effect *to the decree, as it exists. The instance that is generally given of a supplemental bill in aid of a decree is of this description—where there has been a decree to account, but directions have not been sufficiently given as to the manner of accounting, and a further decree is therefore required for the purpose of supplying this defect, that is, of carrying into full effect the original decree. In the case that was cited, of *Dormer v. Fortescue* (2), Lord HARDWICKE states, what seems to be the foundation of the passage in Mitford, "that supplemental bills are often brought even in aid of a decree of this Court;" and he illustrates that by the case to which I have referred, for he says "as in a decree to account for want of full directions before" (3), and the very case of *Dormer v. Fortescue* seems to be a case of that description, because, there, the original decree had established the title, but there was a doubt, whether the Court would be justified in founding on that decree and on the existing record, an order that the party should account for the rents and profits from the time when the title of the plaintiff had accrued; and, for the purpose of supplying that supposed omission, the supplemental bill was filed. Lord HARDWICKE was of opinion that the proceedings were sufficient, but supposing, he said, that they were not, the supplemental bill had rendered them sufficient. Now that was strictly a supplemental bill for the purpose of carrying out and

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(1) P. 62, 4th ed.

(3) *Ibid.* p. 133.

(2) 3 Atk. 124.

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accomplishing the original decree, and the object of it, not for the purpose of varying the principle of the decree: and therefore, I apprehend, the distinction is that which I have stated—that a supplemental bill in aid of a decree is not a supplemental bill that seeks to vary the principle of the decree, but one which takes the principle of the decree as the basis and seeks merely *to supply any omission which there may be in the decree, or in the proceedings, so as to enable the Court to give full effect to its decision.

Now the decree prayed for in this case is quite contrary to the principle of the original decree. The original decree was merely for a common account. The supplemental bill prays for an account of quite a different nature and character, founded on the wrongful conduct of the parties; for it calls upon them to account, not for what they have received or what has come to their hands, or to the hands of others for their use, but for what they might have received, had it not been for their wilful default. This therefore cannot be considered as a supplemental bill in aid of a decree, because it proceeds upon a principle quite different from that of the original decree. It does not seek to carry out that decree; it is not in furtherance of that decree, but for the accomplishment of quite a different object; and I think the plaintiff himself has pronounced his own opinion of the nature of the bill upon the very face of the bill itself, for he has introduced an averment, that the supplemental matter has been discovered since the original decree was pronounced—an averment which is necessary for the purpose of supporting a supplemental bill in the nature of a bill of review, but which is not required in a supplemental bill in aid of a decree. On this point, therefore, I am of opinion, that the objection to the VICE-CHANCELLOR's order cannot be sustained.

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The next point taken was a point of form, namely, whether or not the bill ought to be taken off the file. It was stated by *Mr. Wakefield* that that, in point of practice, was not a proper course of proceeding. Now, consider this on principle and on authority. A bill has *been put upon the file contrary to the practice of the Court. It is an improper proceeding, it has been improperly put upon the file. What is a more just, natural, or proper remedy than to take it off the file? Then as to authority, there is a case (*Milligan v. Mitchell* (1) I think), in which the Court had made an order, allowing an amendment of the bill by adding parties. Instead of amending in that way, by merely adding parties, other amendments were added, and the bill, with these

(1) 45 R. R. 218 (3 My. & Cr. 72).

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BALL.

amendments, was put upon the file. What did Lord COTTENHAM do? He ordered the bill to be taken off the file. That was one of the cases cited at the Bar of an analogous description to the present; it was not, indeed, a supplemental bill, but it was a proceeding improperly put upon the file without the permission of the Court, and the Court applied this remedy. So, in another case that was mentioned, of *Perry v. Phelps* (1), Lord ELDON seemed to consider that the proper course of proceeding was to take the bill off the file. But then it is said that, in giving that opinion, he referred to the case of *Young v. Keighly*, and that when you look at the report of *Young v. Keighly*, the passage to which he referred, is not to be found in the report, and it is therefore suggested that he was under some misapprehension in that respect. But suppose it was so, the passage in *Perry v. Phelps* shows, at least, Lord ELDON's opinion, that that was the proper course of proceeding; and he thought that course had been adopted in the previous case of *Young v. Keighly*: perhaps he made some mistake in the name of the case. However, that authority is sufficient to show what was Lord ELDON's opinion as to the practice. Then came *the case before me, of *Partridge v. Usborne* (2), which was argued at great length, and in which a great many important points were agitated; but it never occurred to any of the gentlemen at the Bar who argued that case—men of great experience—to take any objection to the course, proposed to be adopted, of taking the bill off the file. So that I apprehend, upon principle and upon the authorities to which I have referred, the proper course of proceeding, in a case like this, is to order the bill to be taken off the file.

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But then *Mr. Wakefield*, who is full of resources, had another objection. He said that this was not merely a supplemental bill in the nature of a bill of review, or a supplemental bill in aid of a decree, but that it was also a bill of revivor; and that, being properly on the file as a bill of revivor, it could not be taken off; but I think the answer given to that by the VICE-CHANCELLOR was the proper answer, "If you have chosen to mix together two bills for these two different objects, and if they cannot be detached and separated the one from the other, and one is improperly on the file, the whole must follow the fate of that which is improperly on the file."

For these reasons, therefore, I am of opinion that the order of the VICE-CHANCELLOR was right, and that this motion must be refused with costs.

(1) 17 Ves. 173; see p. 184.

(2) 5 Russ. 195.

MITFORD *v.* REYNOLDS.

1841.
Nov. 18, 19,
20.

On Appeal.

1842.
Dec. 8, 20.

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L.C.

[185]

(1 Phillips, 185—199; S. C. 12 L. J. Ch. 40; further proceedings 16 Sim. 105; 17 L. J. Ch. 238; 12 Jur. 197.)

[A REPORT of the proceedings in this case, both before and subsequently to this appeal, taken from 16 Simons, will be given in a later volume of the Revised Reports. The judgment on this appeal will be found in the report of those proceedings.]

1842.

SMITH *v.* THE DUKE OF BEAUFORT.

On Appeal.

Lord
LYNDHURST,
L.C.

[209]

(1 Phillips, 209—222; S. C. 13 L. J. Ch. 33; 7 Jur. 1095; affg. 1 Hare, 507.)

[A NOTE of the judgment on this appeal will be found at the end of the report below. See 58 R. R. at p. 173.]

1843.

TAYLOR *v.* RUNDELL.

May 29.
Nov. 15.

Lord
LYNDHURST,
L.C.

[222]

(1 Phillips, 222—226; S. C. 13 L. J. Ch. 20; 7 Jur. 1073; affg. 1 Y. & C. C. C. 128.)

Where a defendant is interrogated as to the contents of the books of a Company in which he is a partner, and the question is one which he is bound to answer if he can, it is no excuse for not answering to say that the books are in the custody of the officer of the Company, and that his partners will not allow him access to them. If he has a right to inspect the documents, he is bound to enforce that right, and the Court will, if necessary, give him time for that purpose.

THIS case came on upon exceptions to the Master's report of the insufficiency of a sixth examination put in by the defendants under the decree; the exceptions having, by permission of the LORD CHANCELLOR, been set down to be heard by his Lordship in the first instance.

The plaintiffs were the executors of the late Duke of York, by whom a lease had been granted to the defendants (nominally for their own benefit, but really as trustees for a mining association in which they were shareholders, and three of the directors) of certain mines in Nova Scotia, reserving certain payments to the Duke, depending on the amount of profits to be made by working the mines. The object of the interrogatories was to obtain discovery respecting the working of the mines, and an account of the profits made thereby: and the reason assigned by the defendants in their several examinations, for not giving fuller information on these points, was, that the books of the association were in the custody of

the secretary, who was the common agent of themselves and their co-directors, and that the latter refused to allow them to be inspected.

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[The case is reported on exceptions to the fifth insufficient examination in 1 Y. & C. C. C. 128; but the VICE-CHANCELLOR's observations on that occasion are so completely in accordance with and covered by the LORD CHANCELLOR's later decision on the present hearing that it was thought unnecessary to retain the earlier report.]

The relative position of the plaintiffs and defendants in the suit will be found more fully stated in *Craig & Phillips*, p. 104, on an appeal before Lord Cottenham, respecting the sufficiency of an answer in a different suit, but between the same parties and for a similar object (1).

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It being now admitted on all hands, that, assuming the statement of the defendants to be true, they had done all they could to obtain access to the documents in question, short of filing a bill for them,

Mr. Wakefield and *Mr. Wood*, in support of the exceptions to the report, contended, that the defendants were not bound to take any further steps; * * that partnership books, like partnership secrets, were not to be disclosed to strangers without the consent of all the partners, and that the Court would not compel such a disclosure by some in the absence of the rest. * * *

Mr. Russell and *Mr. Giffard*, *contrà*. * * *

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Mr. Wakefield, in reply.

THE LORD CHANCELLOR:

Nov. 15.

This case has come on again upon exceptions to the Master's report. The report states the examination of the defendants to be insufficient. By the decree of the 5th of May, 1837, it was ordered that the defendants Edmund Waller Rundell, Thomas Biggs, and John Gawler Bridge, should produce all deeds, books, &c. in their custody, or power relating to the matters therein mentioned, and should be examined on interrogatories as the Master should direct.

The defendants in their examination represent that they are unable without the inspection of certain documents *to give any further information than they have already done; that such documents are in the possession of the secretary, and under the joint

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(1) See 54 R. B. 227.

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RUNDELL.

control of themselves and their co-directors of the mining association, and that the other directors refuse to allow the defendants to inspect them. They state that repeated applications have been made by, or on the part of, the defendants to allow the inspection, but always with the same result. The question is, whether this is a sufficient excuse for not further answering the interrogatories; whether, to use an expression of Lord ELDON's, parties shall be allowed thus to baffle the jurisdiction of the Court.

The defendants are the lessees of the mines: the legal estate is in them; they are also directors of the association, and proprietors or shareholders in the concern. As proprietors they have, by the very terms of the deed of association, a right, subject to certain regulations as to time, &c., to inspect and take copies of the documents in question; and as directors they have a right to the inspection of them at any time: the possession of the secretary is their possession: he is their servant: and their co-directors have no right to exclude them. Is it sufficient then for a party who is required to speak as to the contents of such documents as are in his custody, possession, or power, to say, that he cannot comply with the order because his documents are wrongfully withheld from him? I think not. Suppose an agent withholds papers belonging to his principal, would the statement of such a wrongful act be an excuse for not producing them, or not speaking as to their contents? In a former case between these parties, Lord COTTENHAM put the case of a solicitor wrongfully withholding the papers of his client, as affording no *excuse for the non-production: the Court, he said, would allow the party time to vindicate his right; and the same principle will apply here, though the difficulty may be somewhat greater.

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A party is bound to inspect, and answer as to the contents of, all documents that are in his possession or power; and all which he has a right to inspect, provided he can enforce that right, are in his power.

Exceptions overruled.

EX PARTE EYRE.

IN THE MATTER OF JOHN WRIGHT AND OTHERS.

(1 Phillips, 227—239; S. C. 3 Mont. D. & D. 12; 12 L. J. Ch. 266; 7 Jur. 162.)

A customer of a banking firm, whose practice it was to receive deposits, at their banking-house, of boxes of securities belonging to their customers, for safe custody, lent part of such securities to J. W., one of the partners in the firm, on his own separate account, other securities being deposited by him in the box according to agreement, in pledge for those which were borrowed. J. W., without the knowledge either of his co-partners or the customer, subsequently abstracted the securities pledged by himself and applied the proceeds to his own individual use.

Held, that the firm was not responsible for the abstraction by J. W. of the securities pledged, although the key of the box, as well as the box itself, was left in the custody of the firm, inasmuch as it did not appear that the firm had any authority to open the box or to examine its contents: and consequently that the customer had no right of proof, in respect of the second loan, against the joint estate, but only against the separate estate of J. W.

THIS was an appeal, in the form of a special case, from the Court of Review.

The substance of the case was as follows :

The bankrupts had been in partnership as bankers, in London. Some years before the bankruptcy, the petitioner, who was one of their customers, deposited with them a tin box marked with his initials, containing divers valuable securities. The key of the box was placed with other keys of the same description *belonging to other customers of the Bank, on lettered pegs in a desk or cupboard at the banking-house, and “the said boxes and their keys” (as the case stated) “were in the custody and care of the partnership.”

In the month of September, 1838, the petitioner’s box contained, amongst other securities, certain Cuba bonds to the amount of 53,200*l.*, which were transferable by delivery, and bore interest at 6 per cent. payable in London. In the course of that month the bankrupt, John Wright, requested the petitioner to lend him 25,000*l.* of those bonds on the security of some certificates of shares in the Southampton Railway Company, with which request the petitioner complied, and thereupon John Wright wrote to him the following letter.

“LONDON, September 19th, 1838.

“I hereby, in consideration of your lending me 25,000*l.* Cuba bonds, deposit with you 400 certificates in the Southampton Railway, and which 400 shares I hereby in every way agree to assign to you, till the said Cuba bonds are redeemed by me ; and

1842.

Nov. 7, 8.

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Jan. 12.

Lord

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EYRE.

should I fail in my obligation, you are at liberty to dispose of the same for your own reimbursement within four months.

“JOHN WRIGHT.”

On the same day 25,000*l.* Cuba bonds were taken out of the box, and 398 Southampton Railway certificates were deposited in their place together with the letter, and the next day the following memorandum, which was drawn up by Joseph Beadle, a clerk in the Bank, was also placed in the box.

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“For the loan from Mr. E. Eyre to Mr. J. Wright of 25,000*l.* Cuba bonds, Mr. W. has deposited in Mr. *Eyre’s box, 398 shares in the Southampton Railway Company as a security, to which Mr. Wright will add some other shares when received.

“Sept. 20th, 1838.

“For W. & Co.

“JOSEPH BEADLE.”

In pursuance of the engagement contained in that memorandum, John Wright afterwards added 23 other Southampton Railway certificates, and deposited the same in the box, making altogether 421.

In the month of November, 1839, an application was made to the petitioner by the partnership firm, to lend them the remainder of the Cuba bonds, amounting to 28,200*l.* upon their depositing with him, as a security, certain American securities, called Norris Town and Valley Railway bonds, to the amount of 33,000*l.*, to which application the petitioner having acceded, the rest of the Cuba bonds were, on the 23rd November, taken out of the box, and the Norris Town and Valley Railway bonds were deposited in their place, and, on the same day, J. Wright wrote to the petitioner a letter containing the following passage.

“In respect of 28,200*l.* Cuba bonds, which I borrowed from you this day on account of the house, we deposit as a security 33,000*l.* Norris Town and Valley Railway bonds, and we hereby engage to replace the said Cuba bonds at or within the expiration of three months from this date, if you should require us to do so.”

On the 27th February, 1840, the Norris Town and Valley Railway bonds were, at the request of the partnership, exchanged for Cairo City and Canal bonds to the same amount, and the latter were deposited in the box in their place.

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On the 23rd November, 1840, the Bank stopped payment, having regularly credited the petitioner in the books half yearly with interest at 6 per cent. upon the whole amount of the Cuba bonds, down to

the 5th September preceding. Immediately on hearing of the stoppage, the petitioner went to the banking-house and asked for the box, when, on examining its contents, he found, what he was not before aware of, that the Southampton Railway certificates had been taken out, and some debentures of the Commercial Steam Packet Company, and several American securities, deposited in their place; he also found the following memorandums in the handwriting of Joseph Beadle, a clerk in the Bank, endorsed on the letter of the 19th September, 1838.

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EYRE.

“July 13th, 1840. Delivered to Mr. John Wright, certificates for 100 shares, part of the within mentioned shares deposited as a security, in lieu of which he has deposited 5,000*l.* bonds of the Maryland Iron and Coal Company for the same purpose.

“For W. & Co.

“JOS. BEADLE.”

“July 30th, 1840. Delivered to Mr. John Wright, 100 Southampton Railway shares, part of the within mentioned, of which 21 are returned.

“J. B.”

“October 21st, 1840. Delivered to Mr. Wright, 50 Southampton Railway shares, part of the within mentioned, and deposited in lieu thereof 5,000*l.* Commercial Company debentures.

“J. B.”

“30th October, 1840. Delivered to Mr. Wright, 100 shares, further part of the within mentioned, and deposited *in lieu thereof 5,000*l.* Commercial Steam Company debentures.

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“J. B.”

“13th November, 1840. Delivered to Mr. Wright the remaining 100 shares.”

The *fiat* issued on the 17th December, 1840.

In addition to the facts above mentioned, it appeared from affidavits of John Wright and Joseph Beadle, which were set forth as part of the special case, that none of the other partners in the Bank were privy to any of the transactions referred to in these memorandums; that the loan of the 25,000*l.* was a private transaction between the petitioner and J. Wright individually; and that the Southampton Railway shares, as well as the securities substituted for them, were his private property; and that no part of the proceeds of the Southampton Railway shares was received by the partnership. It further appeared from the affidavit of Beadle, that though clerk

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to the firm, he was in the habit of attending to the private business of John Wright, and that he often subscribed his name as acting for the firm in private transactions of the individual partners, as well as in matters relating to the firm itself; and that, in this instance, he had no authority from the firm, or any of the other partners, to interfere with the securities lodged by the petitioner with J. Wright.

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The petitioner, by his petition to the Court of Review, had prayed that the Cairo City and Canal bonds and also the securities which had been substituted for the Southampton Railway shares might be sold, and that he might be at liberty to bid, and that he might also be at liberty to prove the deficiency of the loan of 28,200*l.* *Cuba bonds against the joint estate, and the deficiency of the loan of 25,000*l.* Cuba bonds against either the joint estate, or each of the separate estates of the bankrupts.

The order made upon that petition referred it to the Commissioner to ascertain the value of the 25,000*l.* Cuba bonds on the 13th July, 1840, and the petitioner was declared to be a creditor of the separate estate of John Wright for such value. And it was ordered that the securities substituted for the Southampton Railway shares should be sold, with liberty to the petitioner to bid; and if the proceeds of such sale should be insufficient to pay the petitioner the value of the 25,000*l.* Cuba bonds, he was to be at liberty to prove for the deficiency against the separate estate of J. Wright. * * *

Nov. 7.

Mr. Bethell and *Mr. Purvis*, for the appellant :

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* * As to the 25,000*l.* bonds lent to J. Wright individually. The claim of the petitioner, as to this, is two-fold ; a claim *ex contractu* against J. Wright, and a claim *ex delicto* against the other partners ; for the Southampton Railway shares having been intrusted to the custody and care of the firm, all the partners were jointly and severally responsible for a breach of trust committed by any one of their number, *Devaynes v. Noble, Clayton's* case (1). The Court below, indeed, distinguished that case from the present, on the ground that, here, the partnership derived no benefit from the fraud ; but the doctrine of this Court as to the liability of trustees, [*234] *recognizes no such distinction : *Walker v. Symonds* (2), *Munch v. Cockerell* (3).

(1) 15 R. R. 161 (1 Mer. 572).

(2) 19 R. R. 155 (3 Swanst. 1).

(3) 42 R. R. 165 (8 Sim. 219).

Mr. Swanston, Mr. Dixon, and Mr. Clarke, for the assignees :

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EYRE.

* * The loan of the 25,000*l.* Cuba bonds was a private transaction between the petitioner *and J. Wright, and the demand against the firm is a demand founded not upon contract, but upon an alleged breach of trust, in suffering the railway shares to be abstracted from the box. The case, however, is not one of trust but of bailment, and of bailment without hire : for it does not appear that the bankers derived any benefit from the deposit. It has been generally supposed that bankers have no lien for their customers' balance, upon plate or other property of that kind deposited with them ; which shows that they don't take charge of such things in the character of bankers, but only for the accommodation of their customers. If so, they are bound only to take ordinary care of the articles ; and in order to charge them with a loss, it is necessary to make out a case of gross negligence. For that, however, there is here no pretence, for though the key was left at the Bank, it does not follow that the bankers had any right to open the box, and if not, they had no means of knowing what securities were from time to time contained in it.

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THE LORD CHANCELLOR :

It seems difficult to maintain that argument as you have put it ; for the special case states, as a fact, that the securities—not the box merely, but the securities—were left in the custody and care of the partnership. But there is another view of that part of the case which has struck me, and it is this—that, after the box and the securities had been left with the partnership to take care of, Mr. Eyre entered into a transaction with one of the partners for the separate interest of that partner ; he communicated with that partner alone, and authorized him to take out part of the securities, and to substitute others in their place ; now, if he considered the securities as under the care of the partnership, he ought, every time that he exchanged any of them, to have informed the partners ; otherwise, *how were they to know what the box from time to time contained ?

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Mr. Purvis, in reply.

THE LORD CHANCELLOR :

This is a special case from the Court of Review, arising out of the bankruptcy of Messrs. Wright & Co.

No objection has been raised by the assignees, as to that part of

1843.
Jan. 12.

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EYRE.

the order by which Mr. Eyre is allowed to prove in respect of the 25,000*l.* Cuba bonds against the separate estate of Mr. Wright. The principal question is, whether he is entitled to prove against either the joint or separate estates in respect of the 28,000*l.* Cuba bonds which were lent to the partnership.

They undertook in the first instance to replace them at or within three months, if required to do so. No application for that purpose was made; and after the expiration of the three months the partnership requested permission to exchange the original securities, which they had so deposited, for the Cairo bonds. This was accordingly done, but without any new stipulation as to the period of redemption. After this transaction, therefore, the time for replacing the Cuba bonds became indefinite: and it was not incumbent upon the partnership to replace them, until they were requested so to do on the part of Mr. Eyre. But, as no such demand was made before the bankruptcy, I think the Court of Review properly decided that this was not a debt that could be proved under the *fiat*. The provisions of statute 6 Geo. IV., respecting the proof of contingent debts, *was referred to in the argument; but it does not appear to me that those provisions have any application to the present question.

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The remaining question is, whether the partnership estate is liable for any loss that may have been sustained by the subtraction, from Mr. Eyre's box, of the London and Southampton Railway certificates, and the substitution by Mr. Wright of other securities in lieu of them, without the authority of Mr. Eyre. It was objected, that the petitioner was not entitled to complain of this part of the order. First, because having presented a petition of rehearing to the Court of Review, he confined his complaint to so much of the order as related to the 28,000*l.* Cuba bonds; and, secondly, because he acted upon this part of the order, by insisting upon the sale of the substituted securities, in opposition to the wishes and remonstrances of the assignees. The Judge of the Court of Review was of opinion under these circumstances, that Mr. Eyre had no right to have this question raised upon the special case. I do not think it necessary to express any opinion upon this point. For as the case has been fully argued before me, not only upon the question of form but upon the merits, it will be more satisfactory, upon the view I have taken of the case, to determine it upon the latter ground—upon the substance, rather than the form.

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EYRE.

It is material, for this purpose, to advert to the facts as stated in the special case. The transaction as to the 25,000*l.* Cuba bonds, and the substitution of the railway certificates, was entirely a private and separate transaction between Mr. Eyre and Mr. Wright. The partnership had nothing to do with it. They had no interest in the railway certificates, nor, when the certificates were withdrawn by Mr. Wright, were they applied in *any way to the use of the partnership. The act was a tortious act committed by one partner, not acting for the partnership or for any partnership object, but in his separate character, and for his own individual and separate purposes. The decision in *Devaynes v. Noble*, which was cited, proceeded upon a very different state of circumstances. In that case the Exchequer bills were sold by the acting partner without the knowledge of Devaynes, but for partnership purposes, and the money was applied to the use of the partnership. The amount therefore became a partnership debt, and the estate of Devaynes was of course liable. The facts of the present case are wholly different, for the abstraction of the railway certificates was a wrongful act committed by Wright for his own private purposes, and, under the circumstances which I have stated, I think the partnership was not responsible.

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It was contended, however, that the joint estate was liable on another ground, viz.: that, as the securities were deposited with the partnership, they were bound to see that they were not subtracted, and that they are chargeable by reason of their negligence. But Mr. Eyre permitted Mr. Wright to exchange the railway certificates for the Cuba bonds: the partnership was not consulted upon that occasion; and when Mr. Wright substituted the other securities for the railway certificates, why was it to be supposed that this was not done with Mr. Eyre's sanction as in the case of the former exchange? The box, indeed, was in the custody of the partnership; but it does not appear from the case, that they had any right to examine the contents. Mr. Eyre had access to it whenever he pleased, and might remove, or authorize any other person to remove whatever portion of them he might think proper, without consulting or asking leave of the partnership. It does not appear to *me, therefore, that there is any ground for imputing negligence to the partnership in this transaction, or to charge the joint estate with the loss which Mr. Eyre has sustained.

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But supposing a case of negligence had been established so as to render the partnership liable, this would rather, I think, be a case

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EYRE.

of unliquidated damages requiring the intervention of a jury, than a debt to be proved under the *fiat*. I am of opinion, therefore, upon the whole matter, that the judgment of the Court of Review should be affirmed, and with costs.

1842.
Dec. 9, 12.

JONES v. SMITH.

(1 Phillips, 244—257.)

WIGRAM,
V.-C.

On Appeal.

1843.

May 11.

Lord
LYNDHURST,
L.C.
[244]

[THE report of the judgment of Lord LYNDHURST, L. C., on this appeal, affirming the decision of WIGRAM, V.-C., in the Court below (1 Hare, 49), will be found at the end of the report before the Vice-Chancellor. See 58 R. R. at p. 98.]

1843.
May 27.

IN THE MATTER OF T. G. WAINWRIGHT AND WIFE AND

SHADWELL,
V.-C.

IN THE MATTER OF THE STAT. 3 & 4 WILL. IV. c. 74.

On Appeal.
June 3.

(1 Phillips, 258—262; S. C. 12 L. J. Ch. 426; 7 Jur. 499; revg. 11 Sim. 352; 13 Sim. 260.)

Lord
LYNDHURST,
L.C.
[258]

On the husband of a married woman, tenant for life under a settlement, being convicted of felony, the Court of Chancery becomes protector of the settlement jointly with the wife.

LANDS were devised by a will to the use of a married woman for life, with remainder to the petitioner in tail, with remainder over. The husband of the tenant for life having been transported for felony, this petition was presented, praying that the Lord Chancellor, as protector, under the Act, of the settlement made by the will, would be pleased to consent to a disposition of the estate by the petitioner for the purpose of barring the entail.

THE VICE-CHANCELLOR OF ENGLAND, to whom the application had been made in the first instance, had refused it, being of opinion that the case was not provided for by the Act.

The application was now renewed by way of appeal, before the Lord Chancellor.

Mr. Humphry and *Mr. Walford*, appeared for the petitioner.

June 3.

THE LORD CHANCELLOR :

The question in this case arises out of the construction of the Act for the abolition of fines and recoveries.

Mrs. Wainewright was tenant for life under the settlement, and, as owner of this prior estate, she and her husband became protector of the settlement. The *husband was convicted of felony, and the question was whether under those circumstances the Court of Chancery and the wife together could consent to a disposition of the property. The VICE-CHANCELLOR thought not. I have considered the case, and with the greatest respect for the judgment of the VICE-CHANCELLOR, I have come to a different conclusion.

In re
WAINE-
WRIGHT.
[*259]

The first point to be considered is, the constitution of protectors under the Act. The owner of the prior estate is the protector, and where husband and wife have the prior estate, they jointly constitute the protector. Where, also, in a settlement several persons are nominated to fill the office of protector, the entire body is called the protector of the settlement. But if you look at the Act, you find that the term protector is not confined to the aggregate body, but that the individuals constituting the body are separately styled protectors. This is clearly the case in the 48th section which provides, that where the Court of Chancery is the protector of a settlement in lieu of any person, and there is "any other person protector of the same settlement jointly with such person," a disposition by the tenant in tail, though approved by the Court, shall not be valid unless such other person "being protector as aforesaid" shall consent thereto. So in the 91st section, to which I shall have further occasion to refer, provision is made for the case where the Court of Chancery is the protector of a settlement in lieu of the husband of a married woman. I think, therefore, that in the construction of this Act, the term protector is applicable equally to the entire body taken collectively, and to each individual separately.

Referring now to the 33rd section, we find it provided, that if any person protector of a settlement *shall be convicted of treason or felony, the Court of Chancery shall be protector of the settlement in lieu of such person. If then, the term protector applies to each individual, this clause comprehends the very case in question: that is, if the husband is to be called protector, and the wife to be called protector as well as both together to be called protector, the case comes distinctly within the terms of the Act.

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But if there were any doubt upon this point, it would be removed by the 91st section, which appears to dispose of the precise case. By that clause the Court of Common Pleas is authorized to dispense with the concurrence of a husband to his wife's disposal of property

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WRIGHT.

in the event of his being of unsound mind, or under other disabilities; and it is then provided, that the clause shall not apply to the case of a married woman where, under the Act, the Lord Chancellor or Court of Chancery shall be the protector of a settlement in lieu of her husband—clearly contemplating in that provision, what I say is the natural construction of the 33rd clause, that the Court of Chancery may be protector in the place of the husband. And the application of the 91st section becomes the stronger, when it is considered that the question can only arise where the wife is protector by reason of her estate, for, if she were appointed by name to be protector, the concurrence of her husband would not be requisite, and if this be so, the proviso could hardly apply to any other case than the present.

It would, indeed, be very extraordinary if it should be otherwise; if the Legislature should have thought it necessary to provide for a case which very rarely occurs, viz. : that both husband and wife should be convicted of felony and should have omitted to provide
[*261] *for a case of comparatively ordinary occurrence. Nothing but the clearest expressions would justify such a construction of the statute.

The doubt seems to have arisen from the direction in the 24th section, that the husband and wife together should be the protector of a settlement in respect of the wife's estate, and be deemed one owner. But it is clear, for what reason that direction is given. It had been declared by the preceding section, that where there were joint tenants or tenants in common, each should be a distinct protector as to his own share; and it was intended that this should not apply to the case of husband and wife, but that the concurrence of both should be requisite to the disposal of any part of the property.

I am of opinion, therefore, that the case is within the Act. There is, however, an omission in the 33rd section, which it is proper to notice. The words are—"If any person, protector of a settlement, shall be convicted of treason or felony; or if any person not being the owner of a prior estate under a settlement shall be the protector of such settlement and shall be an infant, or if it shall be uncertain whether such last-mentioned person be living or dead, then his Majesty's High Court of Chancery shall be the protector of such settlement in lieu of the person who shall be an infant or whose existence cannot be ascertained,"—omitting the case of a person convicted of treason or felony. But I think that the omission must be supplied by implication, otherwise no effect

can be given to the previous words, “if any person protector of a settlement shall be convicted of treason or felony.” Now these words cannot be struck out of the Act, and it is much more natural to supply the words “in lieu of the person who shall be convicted” than to adopt a construction which would *deprive the preceding words of all meaning. No difficulty, therefore, arises out of this omission, and, as I am told, the VICE-CHANCELLOR laid no stress upon the circumstance.

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WAINE-
WRIGHT.

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APPLEBY v. DUKE.

(1 Phillips, 272—275; S. C. 13 L. J. Ch. 9; 7 Jur. 985; affg. 1 Hare, 303.)

When the provisional assignee under the Insolvent Act is made a defendant in that character to a bill of foreclosure, in respect of the equity of redemption, he is not entitled to his costs from the plaintiff, although he may have received no assets of the insolvent wherewith to pay them.

1843.
Jan. 26.
On Appeal.
Nov. 3.
—
Lord
LYNDHURST,
L.C.

[272]

PENDING a suit for the foreclosure of a mortgage, one of the devisees of the equity of redemption, who was a defendant, took the benefit of the Insolvent Act; and the provisional assignee in whom his estate thereupon became vested, having been brought before the Court by supplemental bill, submitted by his answer to act as the Court should direct, on being paid his costs, stating that he had not received any assets of the insolvent wherewith to pay them.

At the hearing of the cause before Vice-Chancellor Wigram, it was insisted on behalf of this defendant, that his costs should be paid by the plaintiff and added to the mortgage debt; but the claim being resisted on the part of the plaintiff was disallowed by the Court.

This was an appeal by the provisional assignee from that decision.

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Mr. Stuart and *Mr. Follett*, for the appellant, [cited *Boswell v. Tucker* (1), and other cases there cited, in which the costs of provisional or official assignees had been similarly provided for].

Mr. Wakefield and *Mr. Chandless*, for the mortgagee. * * *

Mr. Stuart, in reply.

(1) 49 B. R. 418 (1 Beav. 493), in which the MASTER OF THE ROLLS followed the previous cases, but expressed

some doubt whether the practice was right.—O. A. S.

APPELEDY THE LORD CHANCELLOR :

^{r.}
DUKE.

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The defendant Sturgis, the provisional assignee under the Insolvent Debtors' Act, was made a party to *this suit by supplemental bill. The suit was for a foreclosure. He did not disclaim, but submitted by his answer to act as the Court should direct, upon being paid his costs, &c. He further stated that he had received no assets. The question is, whether he is entitled to receive his costs from the mortgagee, in which case they would, of course, be added to the debt due from the mortgagor.

[His Lordship, after referring to the authorities which had been cited, said :]

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Why should the mortgagee suffer, or his security be affected, because by the acts of the mortgagor his interest in the mortgaged premises has been assigned to another? The assignee represents the mortgagor : on what ground then can he, consistently with the established principles of this Court, be entitled to costs? It is said that he does not take the assignment by his own voluntary act ; that it is cast upon him by operation of law. But he accepts the office to which he knows the assignment to be an incident, and in doing so he must be considered as accepting the assignment. It is said that the case is a case of hardship. If it be so, the Legislature must provide the remedy. Unless the Legislature shall so declare, the remedy must not be at the expense of the mortgagee. In my view of the question the case is not affected by the state of the insolvent's assets. I am of opinion, therefore, that the appeal ought not to be allowed (1).

1843.
Jan. 21.

Lord
LYNDHURST,
L.C.

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CLARKE v. WILMOT (2).

(1 Phillips, 276.)

An official assignee, made defendant to a foreclosure suit, as representing the interest of a mesne incumbrancer who had become bankrupt, held not to be entitled to his costs from the plaintiff, although he disclaimed absolutely at the hearing.

In this case, which was also a foreclosure suit, a similar question arose as to the costs of the official assignee of a mesne incumbrancer who had become bankrupt. The assignee by his answer had stated, that he claimed no other interest than such as the Court should think him entitled to. At the hearing however, he, by his counsel,

(1) See the next case.

(2 *Day v. Gudgeon* (1876) 2 Ch. D. 209, 45 L. J. Ch. 263.

disclaimed absolutely, and thereupon Vice-Chancellor KNIGHT BRUCE allowed him his costs (1).

CLARKE
v.
WILMOT.

On appeal from his Honour's decree,

The LORD CHANCELLOR said that the case must follow the decision in *Appleby v. Duke*; and his Lordship accordingly reversed this part of the decree.

BLUNDELL v. GLADSTONE.

(1 Phillips, 279—289; S. C. 11 Sim. 467; 12 L. J. Ch. 223; 5 Jur. 481; 7 Jur. 269; affd. 1 H. L. Cas. 778.)

[REPORTED on appeal to the House of Lords in 1 H. L. C. 778, under the title of *Camoy's v. Blundell*.]

1842.
Feb. 10, 11.
On Appeal.
1843.
Jan. 13.

Lord
LYNDHURST,
L.C.

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1843.
Nov. 22.
On Appeal.
Dec. 15.

Lord
LYNDHURST,
L.C.

[290]

WALSH v. GLADSTONE (2).

(1 Phillips, 290—293; S. C. 8 Jur. 25.)

Where a legacy was given by a will to A. B., "to be applied to the use of" a certain Catholic college and A. B. died in the testator's lifetime, the Court on being satisfied of the respectability and permanent character of the institution, ordered the legacy to be paid to the President of the college, who was the officer intrusted with the management of its pecuniary affairs, without requiring any scheme to be settled, although the *Attorney-General* asked for one.

THE testator, Charles Robert Blundell, by his will, dated the 28th of November, 1834, gave, amongst other bequests, "a sum of 4,000*l.* to the Rev. Thomas Robinson, to be applied to the use of Ampleforth College in Yorkshire."

A sum of stock sufficient to answer this legacy having been carried over to a separate account, a petition was presented by the Rev. Thomas Cockshott, stating that Ampleforth College was a seminary or college which had existed since the commencement of the present century, for the education and instruction of persons professing the Roman Catholic religion: that it was under the direction and government of an officer called the President: and that the President for the time being had the absolute control and management of the revenues and property of the college, and was alone entitled to receive and give receipts for the same, and to conduct and manage the expenditure of the college; and that all gifts heretofore made to the college, or for the benefit thereof, had

(1) See 57 B. R. 236 (1 Y. & C. C. C. 53).

(2) *In re Lea* (1887) 34 Ch. D. 528, 56 L. J. Ch. 671, 56 L. T. 482.

WALSH
f
GLADSTONE.

been paid to that officer ; and praying that the legacy in question might be paid to the petitioner as the present President of the college, the Rev. Thomas Robinson having died in the lifetime of the testator.

The VICE-CHANCELLOR having, upon affidavits verifying the above statements of the petition, made an order for payment of the legacy to the petitioner, the *Attorney-General* appealed from that order.

The appeal petition now coming on to be heard,

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Mr. Wray, in the absence of *Mr. Twiss*, for the *Attorney-General*, contended that so large a sum ought not to be paid to an individual calling himself President of the college, without a reference to the Master to approve of a scheme for its application, or at least some inquiry into the nature and objects of the institution. If the testator had himself made choice of the President as the hand to receive the money, or if he had given it directly to the college, it would have been different ; but where, by the death of the trustee selected by the testator, the execution of a trust devolved upon the Court, the invariable course was to refer it to the Master to approve of a scheme for the application of the fund.

Mr. Tinney and *Mr. Fleming*, for the President of the college, insisted that where there was a subsisting charity, and an officer capable of giving a discharge for a legacy, the Court was in the habit of ordering payment to be made to that officer without directing a scheme.

THE LORD CHANCELLOR :

Whether a scheme should be directed or not will depend upon the information I may have as to the nature of the institution and the situation of the officer. If there are already existing funds belonging to the institution, and if the President who has the management of those funds is appointed for life, so as to give him a permanent character, the legacy may perhaps be paid to him without referring it to the Master to settle a scheme. But, suppose the President held his office by a precarious tenure—by an appointment from year to year, for instance—and that the institution was supported by voluntary contributions, then it might be right that a scheme should be settled. If there is a character of *permanence in the institution, and in the situation of the officer, the Court will hand it over to him without a scheme, as was done lately in the

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case of the Venice charity (1). Where a testator, who is a Roman Catholic, leaves money for the use of a Roman Catholic establishment, all I have to do is to see that it is applied to the use of that establishment, and that it is paid into hands in which it will be safe. I have nothing to do with the internal management, discipline, and mode of education in such an institution. I should wish, however, before I dispose of this petition, to have some more precise information than the present affidavits afford, respecting the nature of this institution, and the situation and character of the President.

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GLADSTONE.

The appeal petition having stood over for further affidavits to be filed, now came on again.

Dec. 15.

It appeared from the further affidavits, that the college had been established in 1802, as a continuation of a similar institution which had existed in France for several centuries, but which had been broken up during the Revolution. That its object was the education of Roman Catholic laymen as well as ecclesiastics: that the governors of the college consisted of persons, who having been educated there, had afterwards been admitted to Holy Orders; and that the President, who was elected every four years by the governors for the time being, was also treasurer of the college, and had the management of its pecuniary concerns, for which he was accountable to an auditor. It also appeared that the testator was well acquainted with the college and the system of its management, and that in 1830 he had *made a present of 500*l.* to it through the medium of the Rev. Thomas Robinson (the person mentioned in the will), by whom the same was paid to the then President.

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There were also affidavits made by several Roman Catholic Peers who had been educated at the college, testifying to the respectability of the President, and the permanent character of the institution.

Mr. Tinney and *Mr. Fleming* having read the affidavits,

Mr. Twiss and *Mr. Wray* again submitted, that as the trustee named by the testator was to apply the fund, and that trustee was dead, a scheme ought to be directed.

THE LORD CHANCELLOR :

It may be that *Mr. Robinson*, if he had been living, would have had a discretion as to the application of the fund: but it would

(1) *Cockburn v. Raphael*, L. C., of the appeal can be found.
May 9th, 1842, on appeal. No report

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have been a fair exercise of that discretion to have paid it over to the President ; and, if I am of opinion that it will be safe in his hands, the Court will be justified in doing the same. Now I think it is quite clear from the affidavits, that the money will be safe in the hands of the President, and if that be so, how can it be better applied for the use of the college than by paying it to the individual who has the management of the general affairs of the institution ? The order therefore is right, being exactly in the terms of the testator's will, only substituting the President for the Rev. Thomas Robinson.

The appeal petition was dismissed, and the costs of all parties ordered to be paid out of the fund.



CAMPBELL v. BROWNRIGG (1).

(1 Phillips, 301—305 ; S. C. 13 L. J. Ch. 7.)

1842.
Dec. 21.
1843.
Jan. 12.
—
SHADWELL,
V.-C.
On Appeal.
Oct.
—
Lord
LYNDHURST,
L.C.
[301]

Under a gift of a sum of money “ to my daughter I. H., to be employed for her use in the following manner ; ” accompanied by a direction that the fund should be invested and the interest only paid to the daughter during her life, and in case she should marry and have children, then the principal to be divided amongst such children : Held, upon the construction of the whole will, the daughter having died without children, that her personal representative, and not the residuary legatee, was entitled to the fund.

THE will of Lionel Hook, dated 21st of February, 1806, was partly as follows :

“ I give and bequeath to my daughter Isabella Hook, now residing with me at Fort William, in Bengal, the sum of 50,000 Sicca rupees, to be employed for her use in the following manner, viz. : the principal of the said sum is to be vested in paper of the East India Company, bearing interest at 8 per cent. ; or, in stock in the English Government funds, should such a manner appear to my executors advisable and proper ; in either case the interest accruing on the said principal sum is to be regularly paid to my said daughter, to be used and appropriated in whatever manner she shall think proper. It is my intention and desire, that the said interest shall be regularly paid to my said daughter during her lifetime ; in the event of her marriage, and of her having a child or children, the aforesaid principal sum of 50,000 Sicca rupees is to become the property of her child or children equally to be divided amongst them, or should there be only one child, then the whole is after the death of my said daughter to become the property of

(1) *Martin v. Martin* (1866) L. R. 2 Eq. 404, 35 L. J. Ch. 679, 15 L. T. 99.

that child. It is however my will and intention, that the interest on the whole of the principal of the said sum shall be regularly paid to my said daughter during her life, whether she shall marry or otherwise." The testator then gave certain pecuniary legacies to his niece Harriett Fraser, and his cousin Mrs. M'Gregor, and several other persons, and proceeded thus: "It is my further will and desire, that the whole of the remainder of my property of every kind be equally divided between my daughter Isabella *Hook, my sister Mrs. Charles Fraser, and my brother Charles Hook, share and share alike."

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BROWNIGG.

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By a codicil dated the 13th of September, 1807, the testator, after giving certain directions relative to a legacy of 10,000 rupees contained in the will, expressed himself as follows :

"It is my further will and desire, that the sums respectively bequeathed by my last will above recited to my daughter Isabella Hook, my sister Mrs. Charles Fraser, my brother Charles Hook, my niece Harriett Fraser, and my cousin Mrs. M'Gregor, shall in the event of the death of either of the parties before my death, become the joint property of my daughter Isabella Hook, my sister Mrs. Charles Fraser, and my brother Charles Hook, or the survivor or survivors of them, share and share alike."

Isabella Hook survived the testator and married, but had no children. Upon her death a question arose, whether a sum of stock, representing the 50,000 Sicca rupees, belonged to her personal representative, or to the residuary legatees.

The VICE-CHANCELLOR OF ENGLAND having decided in favour of the latter, the personal representative of Isabella Hook appealed from that decision.

The appeal was twice argued by,

Mr. Teed and Mr. Elderton, for the appellants.

Mr. Bethell and Mr. Vansittart Neale, for one of the residuary legatees.

Mr. Lowndes, for another residuary legatee.

Mr. Hall, appeared for the executor, but took no part in the argument. [303]

In support of the appeal it was insisted, that the gift was in the first instance an absolute gift to the daughter herself, which could not be cut down by construction to a life interest, unless an intention to that effect could be clearly collected from other parts

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of the will; and that the only object of the subsequent modification of the gift in this case was to secure a provision for the daughter's children in case she should have any.

On the other hand it was argued, that there was in fact no absolute gift in the first instance, but that the whole clause was to be read together, and then it amounted to the same thing, as if the testator had said "I give 50,000 Sicca rupees to be applied so and so."

[*Harrison v. Foreman* (1), *Whittell v. Dudin* (2), *Ring v. Hardwick* (3), *Smither v. Willock* (4), *Sturges v. Pearson* (5), and *Campbell v. Harding* (6) were cited.]

THE LORD CHANCELLOR gave his judgment in writing, during the long vacation :

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After stating the substance of the clause in the will, it proceeded thus: "Isabella Hook the daughter, having died without ever having had a child, the question is, whether her personal representatives are entitled to the 50,000 Sicca rupees invested according to the directions of the testator, or whether this money goes *to his residuary legatees. I think the personal representatives of th daughter are entitled to the fund.

The testator gives and bequeaths to his daughter 50,000 Sicca rupees: it is to be employed for her use; and he directs in what manner it shall be so employed. It is to be invested by his executors. She is to receive the interest during her life. If she has children they are to divide the principal between them after her death. This is the manner in which the legacy given to his daughter is to be employed for her use. There are no further directions. To this extent the use is controlled, but no further. She takes the gift subject to this restriction: when that ceases, it becomes, or rather remains, by virtue of the gift her absolute unfettered property. Such then is the construction I put upon the bequest, and if I am right in this interpretation, the fund, upon the facts stated, belongs to the petitioner.

This view of the case derives, I think, some confirmation from other parts of the will and of the codicil. After giving pecuniary legacies to several other persons, he proceeds as follows: "It is my further will and desire, that the whole of the remainder of my property of every kind be equally divided between my daughter

(1) 5 R. R. 28 (5 Ves. 207).

(2) 22 R. R. 124 (2 Jac. & W. 279).

(3) 2 Beav. 352.

(4) 9 Ves. 233. See 22 R. R. 127 n.

(5) 20 R. R. 316 (4 Madd. 411).

(6) 37 R. R. 169 (2 Russ. & My. 390).

Isabella Hook, my sister Mrs. Charles Fraser, and my brother Charles Hook, share and share alike." The testator having previously enumerated several specific sums, when he speaks of the remainder of his property, the natural interpretation is, the remainder exclusive of these specific sums, which would lead to the conclusion that he considered he had disposed of them absolutely. The testator also in the codicil thus expresses himself. "It is my further will and desire, that the sums respectively bequeathed by my last will above *recited, to my daughter Isabella Hook, my sister Mrs. Charles Fraser, my brother Charles Hook, my niece Harriett Fraser, and to my cousin Mrs. M'Gregor, shall in the event of the death of either of the parties before my death, become the joint property of my daughter Isabella Hook, my sister Mrs. Charles Fraser, and my brother Charles Hook, or the survivor or survivors of them share and share alike." He speaks of all these legacies (Isabella Hook's among the rest) as sums bequeathed, as sums absolutely disposed of, and directs how they shall be appropriated in the event of a lapse by any of the legatees dying in his lifetime, but provides for no other event.

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Entertaining the impression which I have thus stated as to the proper construction of this will, I must, but with sincere respect for the opinion of the VICE-CHANCELLOR, allow this appeal.

VISCOUNT CANTERBURY v. THE ATTORNEY-GENERAL (1).

(1 Phillips, 306—328; S. C. 12 L. J. Ch. 281; 7 Jur. 224.)

Whether the protection given by the statutes 6 Ann. c. 31, and 14 Geo. III. c. 78, to a party in whose house or on whose estate "a fire shall accidentally begin," extends to fires occasioned by the negligence of the owner or his servants, or whether it is confined to fires arising from pure accident in the limited sense of the word. *Quære?* (2)

A petition of right does not lie to recover compensation from the Crown for damage to the property of an individual, occasioned by the negligence of the servants of the Crown.

The reigning Sovereign is not liable to make compensation for damage to the property of an individual, occasioned by the negligence of the servants of the Crown in a preceding reign; nor, *semble*, even where the damage has been done in his own reign.

THIS was a petition of right, in which the petitioner, Viscount Canterbury, claimed compensation from the Crown for damage

1842.
April 24.
May 3, 4.
June 29.

1843.
Feb. 11.

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L.C.

[306]

(1) *Thomas v. Reg.* (1874) L. R. 10 Q. B. 43, 44 L. J. Q. B. 9, 31 L. T. 439. (2) See *Filliter v. Phippard* (1847) 11 Q. B. 347, 17 L. J. Q. B. 89.

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alleged to have been done, in the preceding reign, to some property of the petitioner, while Speaker of the House of Commons, by the fire which, in the year 1834, destroyed the two Houses of Parliament.

The petition was presented in the year 1840, and was delivered by her Majesty to the Lord Chancellor (Lord Cottenham) with the usual endorsement, "Let right be done." An application was then made to his Lordship that a commission might issue to enquire of the truth of the allegations in the petition. That application was opposed by the *Attorney-General* (Sir John Campbell), who insisted that the issuing of such a commission was not a matter of right, but of discretion; and after going at considerable length into the merits, for the purpose of showing that even if the facts stated in the petition should be found to be true, the claim of the petitioner was liable to various insuperable objections in point of law, he submitted that the case was one in which the Lord Chancellor would be justified in stopping the proceedings *in limine* by refusing a commission. To that, however, it was replied that the Queen's mandate endorsed upon the petition had made it the duty of the Lord Chancellor to put the claim in a proper train of investigation, and, for that purpose, to give the petitioner a record upon

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*which a writ of error would lie (1); and, therefore, that unless the *Attorney-General* was willing "to confess the suggestions of the petition," and take issue upon it by general demurrer, a commission was as much a matter of right in a proceeding of this nature as an original writ was in a litigation between subject and subject.

On the conclusion of the argument,

April 24.

The LORD CHANCELLOR reserved his judgment, observing, however, that from searches which he caused to be made in reference to the late case of *The Baron de Bode*, in which a similar point had been raised by the *Attorney-General*, and which was then standing for judgment, he had ascertained that there was no case to be found in which the CHANCELLOR had refused to direct proceedings upon a petition of right.

His Lordship having on a subsequent day intimated his intention to issue a commission, it was arranged that as there was no substantial dispute as to the facts, the statements of the petition should be modified in such a manner as to enable the *Attorney-General* to meet it by a general demurrer.

The petition was accordingly amended. The case made by it as so amended was, in substance, as follows :

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That on the 16th of October, 1834, the petitioner, as Speaker of the House of Commons, occupied a house forming part of the Royal Palace at Westminster, and communicating internally with the other parts thereof, the said house having, by a Royal message from his late Majesty King George the Third to the House of Commons in the year 1794, been appropriated to the use *of the Speaker, and having ever since been occupied, in pursuance of such appropriation, by the Speaker for the time being as his official residence: that during that period it had from time to time been repaired at the public expense by grants of money voted by Parliament for the purpose; but that the occupation of it by the Speaker had always been permissive merely and subject to resumption by the Crown at its pleasure; and that, in one instance, which occurred in the year 1821, when the petitioner was also Speaker, his late Majesty King George the Fourth having occasion for the use of the house, the petitioner and his family had, by the command of his Majesty, quitted it for two days during which it was occupied exclusively by his Majesty and his suite. That on the 16th of October, 1834, a certain room in the said Palace, also forming part thereof, being about to be fitted up for the use of the Court of Review, which had then recently been established, a quantity of old sticks, called tallies, which had been formerly used at the receipt of the Royal Exchequer and were then deposited in the said room, were ordered to be removed and burnt; and that certain persons being servants of, and acting under the authority of the Commissioners of Woods and Forests, who had the ordering and superintendence of all repairs and works required to be done at the Palace, for the purpose of consuming the tallies, placed them in the stoves used for warming the House of Lords, which also formed part of the said Palace, and communicated internally with the other parts of it; “but that they so placed them negligently, carelessly, and improperly, and in such excessive and improper quantities, that by means thereof the stoves became overheated, and caused a fire to break out in the House of Lords, and which extended to other parts of the Palace, including the Speaker’s house, whereby divers articles of furniture, books, prints, plate, and other *effects of the petitioner which he had there deposited for the necessary and convenient occupation of the house by himself and his family, to the value of about 7,000*l.* were burnt

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and destroyed, and the rest to the value of 3,000*l.* were greatly damaged."

The petition prayed that the *Attorney-General*, being attended with a copy thereof, might be required to answer the same: and that the petitioner might thenceforth prosecute his complaint therein, as might be necessary against the said *Attorney-General* as representing the rights and interests of her Majesty, and also against such other persons, if any, and in such other manner as need might require: and that, for that purpose, he might, if necessary, have leave to make the *Attorney-General* and such other persons parties thereto, and to pray such relief in the premises as under the circumstances should be just.

May 3.

To that petition the *Attorney-General* put in a general demurrer; which now came on to be argued.

The *Attorney-General*, Mr. Twiss, Mr. Waddington, and Mr Wray, appeared in support of the demurrer.

Sir Thomas Wilde, and Mr. Serjeant Manning, for the petition.

The argument turned upon the following questions:

1. Whether the protection given by the statutes of 6 Ann. c. 31, 56, and 14 Geo. III. c. 78, to a party in whose house, or on whose estate a fire should accidentally begin, extended to fires caused by the negligence of the owner or his servants, or whether it was *confined to fires arising from pure accident in the limited sense of the word.

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The details of the argument on this point are so fully stated in the judgment, that it is unnecessary to repeat them here. The authorities cited were, *Beaulieu's* case (1), *Snagg's* case (2), *Turbervill v. Stamp* (3), *Vaughan v. Menlove* (4), *Shaw v. Robberds* (5), 1 Black. Com. 431. Incidentally, however, to this point it was contended in support of the demurrer, that upon the petitioner's own statement, he must be taken to have been a gratuitous occupant of the Royal Palace, and that the owner, even of a private house, was under no liability to his guests, any more than to his servants, for accidents of this nature. On the other hand it was insisted, that the permission to occupy the house in question, was to be considered part of the Speaker's salary; and that, even if it were not

(1) Y. B. 2 Hen. IV. 18, pl. 5.

(4) 43 R. B. 711 (4 Scott, 244).

(2) Cro. Eliz. 10, pl. 5.

(5) 45 R. B. 407 (6 Ad. & El. 75).

(3) 1 Salk. 13.

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so, the confidence implied in the relation of host and guest imposed upon the former a peculiar obligation to use such care and caution as to secure the latter from injury.

2. Whether, even assuming that the parties whose negligence caused the fire were the servants of the Crown (for it was insisted that they were the servants of the Commissioners of Woods and Forests, and not of the Crown), the Sovereign was responsible for the consequences of their negligence.

The argument on this point turned chiefly upon the meaning of the legal maxim, that the King can do no wrong; it being contended in support of the demurrer, that that maxim applied to civil torts as well as to criminal acts, and that the meaning of it was, that the Crown was, by virtue of its prerogative, exempt from all *imputation of, and consequently from all liability for, wrongs committed by its servants in the discharge of their duties; that, as a consequence of that principle, it had been laid down, that the King could not, in his own person, arrest a subject, though his servant might, because if the arrest were wrong the subject could not have his action, whereas the servant was liable, though the act were done in the presence of the King and by his authority (1). That, but for such prerogative exemption of the Crown, claims of this kind would be of common occurrence, as in the familiar instance of merchant ships being run down or damaged by ships of the Royal Navy; and that the surrender made by the Crown, at the beginning of every reign, of its hereditary revenues, in consideration of a Parliamentary appropriation for the expenses of the civil list, without any provision being made for the satisfaction of claims of this description, had not only divested the Crown of any fund upon which a judgment in the nature of damages could be enforced, but was itself a strong circumstance to show that the law recognised no such liability in the Crown as was sought to be enforced by this petition.

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On the other hand it was contended, that even supposing that the parties who did the injury were the servants of the Commissioners, yet, inasmuch as the service in which they were engaged at the time, was not within the sphere of the duties imposed upon the Commissioners by the Act of Parliament (2), but an extraordinary service in which the Commissioners were employed, as

(1) 2 Inst. 186. [Hussey, C. J. said that Sir John Markham told King Edward IV. he could not arrest a man on suspicion of treason or felony, as

any of his lieges may, because if he does wrong the party cannot have an action: 1 Hen. VII., 4, pl. 5.—F. P.]

(2) 1 Will. IV. c. 1.

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any other agents might have been, by the express order of the Sovereign, the Crown was liable as the ultimate principal: *Stone v. Cartwright* (1), **Bush v. Steinman* (2). With respect to the maxim that the King could do no wrong, they contended that the construction put upon it by the other side, was incompatible alike with the dignity of the Crown, and with the rights and interests of the subject: that the true meaning of the maxim was, that the Crown had no right, by virtue of its prerogative, to do or authorise any act to be done, which, if done by a private individual, would be a wrong: Sheppard's Abridgment (3), and that no construction of the maxim, which should enable the King to do a wrong to the subject without being liable to make compensation for it, could be a right construction; for it was an established rule, that prerogatives must be for the advantage and good of the people, otherwise they ought not to be allowed by the law: 6 Bac. Abr. 386, 1 Blackst. Com. p. 230, *Rorke v. Dayrell* (4). And that no argument in favour of the supposed exemption of the Crown could be legitimately founded upon the practice introduced in modern times, of surrendering the Royal revenue to the service of the State, or upon the practical difficulty which that circumstance might create in the way of enforcing a judgment against the Crown; for, if the liability existed, it could not be doubted that the public, which was interested in maintaining the dignity of the Sovereign, would, through Parliament, provide the means of giving the party the fruits of his judgment, and would not allow an arrangement entered into solely with a view to the more convenient administration of the revenue, to stand in the way of the enforcement of a just and legal right.

3. Whether a petition of right was a form of proceeding applicable to a claim for unliquidated damages.

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On this point it was contended in support of the petition, that the petition of right would lie against the Crown, wherever an action would lie against a subject; the only reason why an action did not lie against the King being the technical reason, that the King from whom all judicial process issued, could not issue process against himself (Comyn. Dig. tit. Prerog. D. 78); and if the remedy by petition of right were not co-extensive with that by action, there would be cases in which a right would exist without a remedy. Even, therefore, if there was no precedent for a petition of right in a case of this kind, that would be no answer to the present petition;

(1) 3 R. R. 220 (6 T. R. 411).

(2) 1 Bos. & P. 404 [overruled.]

(3) Tit. Prerog. p. 48, pl. 5.

(4) 2 R. R. 417 (4 T. R. 402).

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for if the right existed, there must necessarily be some mode of enforcing it, and it would not be pretended that there was any other form of proceeding for that purpose, but a petition of right; it was insisted, however, that the case of *Gervais de Clifton* (1) was, like this, a petition of right claiming compensation from the Crown for an alleged injury to the petitioner's land, and in which no objection appeared to have been taken to the form of the proceeding as being inapplicable to a claim of that nature. Another case was also cited from the Year Book, 17 Edw. III. f. 59, pl. 58, as an instance in which a petition of right had been brought upon an alleged tort on the part of the Crown.

On the other hand it was contended, that the remedy by petition of right was applicable only to cases where property of the subject was unjustly detained by the Crown, or where the subject claimed a debt due to him from the Crown by contract: Staunford (2). That the proceedings in *Gervais de Clifton's* case bore too little resemblance to those upon a petition of right, to be *of any value as a precedent for such a petition in a case like the present, and it was further observed, that if any such precedent had existed, Lord Somers in his judgment in the *Banker's* case (3), would not have failed to notice it, inasmuch as it was material to his argument to show the utmost limits to which that remedy extended.

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4. Whether the reigning Sovereign was liable to make compensation for a wrong done by the servants, and during the reign, of his predecessor.

The objections taken to the petition on this point were, first, that the Queen was not the personal representative of the late King; and secondly, that if she was, the case was within the rule *actio personalis moritur cum personæ*. In answer to which it was insisted, that as all acts done or orders given by the King in the exercise of his Royal authority, were to be considered as the acts and orders not of the individual wearing the crown, but of the metaphysical abstraction called the King, and to which the Constitution assigned the attribute of perpetuity, so the liability for the consequences which might result from those acts and orders attached, not to the person of the Sovereign, but to the kingly character, and consequently to the person who for the time being filled that character. That this peculiarity in the relation of successive Sovereigns made it impossible to apply to them the rules which regulated the succession to rights

(1) Y. B. 22 Edw. III. f. 5, pl. 12. Prerog. ch. 15, p. 42.

(2) Tit. Petition, ch. 22. Tit. (3) 14 How. St. Tr. 39; see p. 84.

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and liabilities in the case of private individuals: for instance, the right of presentation to vacant benefices, which in the case of private individuals passed to the personal representative, in the case of the Sovereign vested on his death in the successor to the throne; and if each Sovereign represented his predecessor for the *purpose of succession to property, it would seem to follow that he should also represent him for the purpose of succession to liability.

The following cases were cited upon this branch of the argument: Case of *The Duchy of Lancaster* (1), *Soldiers' case* (2), *Everle's case* (3), *The Abbot and Convent of Warden's case* (4), *Gervais de Clifton's case* (5), and *Robert de Clifton's case* (6).

1843.
Feb. 11.

THE LORD CHANCELLOR:

This was a demurrer by the *Attorney-General* to a petition of right.

The first question was, whether, as between one subject and another, an action can be maintained for damage through fire in a dwelling-house, occasioned by the negligence of the owner or his servants.

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By the 6 Ann. c. 31, s. 6, it was enacted that no action should be maintained against any person in whose house or chamber any fire should accidentally begin. Sir William Blackstone, in his *Commentaries* (vol. i. p. 481), observes, that by the common law, if a servant kept his master's fire negligently so that his neighbour's house was burnt down thereby, an action lay against the master. "But now," he says, "by statute 6 Ann. c. 31, the common law is altered, for that statute ordains that no action shall be maintained against any in whose house or *chamber any fire shall accidentally begin, for their own loss is sufficient punishment for their own or their servant's carelessness." He thus states it distinctly as his opinion that for a fire in a dwelling-house, originating in the negligence either of himself or his servant, the master is not responsible. No authority, indeed, or decision is referred to in support of this opinion, nor does the learned author explain how this construction of the Act is to be reconciled with the words "shall accidentally begin." But although this work has gone through many editions and been subjected to much criticism, no observation that I can find has ever been made upon this passage, or any objection urged against it. I may further

(1) Plowd. 212.

(2) 6 Co. Rep. 27 a.

(3) Ryley's Plac. Parl. 251.

(4) Ryley's Plac. Parl. 262.

(5) *Ubi supra*.

(6) 18 Edw. II., 1 Rot. Parl. 416.

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observe, that although cases of damage from the burning of houses occasioned by negligence have, doubtless, frequently occurred since the statute, I do not recollect, in the course of a pretty long professional life, any instance of an action having been brought to recover compensation for this species of injury, nor do I find in the books any trace of such a proceeding.

The learned counsel for the petitioner adverted to the previous state of the law, for the purpose of explaining what he supposed to be the object of the Legislature in passing this statute. Every master of a house or chamber, he said, was bound so to keep his fire as to prevent it from occasioning injury to his neighbours and others. If a fire broke out in a house, and burnt the adjoining dwelling, or did other damage, the master of the house in which the fire began, was liable to make compensation for the injury: it was not necessary to prove negligence; the law presumed it, and it was stated in the declaration. The leading authority referred to was the Year Book, 2 Hen. IV. pl. 18, which, however, seems to have been differently interpreted by Brooke (1). All the *authorities on the subject are collected in the different abridgments, viz. in Brooke, in Rolle, in Comyns's Digest, in Viner, and other places. In Rolle's Abridgment (Action on the Case (B.), title Fire), they are thus stated: "If my fire, by misfortune burns the goods of another man, he shall have his action on the case against me: 2 Hen. IV. 18. If a fire breaks out suddenly in my house, I not knowing it, and it burns my goods, and also my neighbour's house, he shall have his action on the case against me (42 Ass. 9). So if the fire is caused by a servant, or a guest, or any person who enters the house with my consent (*Ib.*). But otherwise, if it is caused by a stranger who enters the house against my will" (*Ib.*). This rule, it was said, was founded on the general custom of the realm; in other words, it was a peculiarity in the common law.

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It was further observed, that in the time of Holt, a doubt arose whether this custom extended to a fire lighted in the owner's close.

he question, said the CHIEF JUSTICE, is, whether a special negligence need be proved (thereby explaining the effect of the custom): and it was decided by three of the Judges against one, that the action was well brought upon the custom: *Turbervill v. Stamp* (2). But in that case it was said by Holt, that if the defendant could show that the fire was occasioned by inevitable accident, by

(1) Br. Abr. Action on the Case, pl. 30. (2) 1 Comyns, 32; 1 Salk. 13.

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impetuous and sudden winds, and without negligence of himself or his servants, this would constitute a good defence.

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The result as argued for the petitioner was this, that the master of a house was responsible for the safe keeping of his fire, and in the event of accident was only *excused by showing on his part that the calamity arose from some superior cause which he could not resist or control ; and that the object of the statute of Anne was to correct this anomaly, and to put the law, in this respect, on the same footing as the general law of the country, namely, that the party should be responsible only upon proof that the fire was occasioned by actual negligence of himself or his servants. That the statute confined the indemnity to the person in whose house or chamber a fire should accidentally begin, and that it carefully guarded against extending it to cases of negligence.

It is remarkable that in Bacon's Abridgment, under the title Action on the Case, p. 104, he states that it was formerly held, that if a fire broke out accidentally in a man's house, and raged to that degree as to burn his neighbour's, that he in whose house the fire first happened was liable to an action on the general custom of the realm, *quod quilibet ignem suum salvo, &c.* "But now," he says, "by the stat. 6 Ann. c. 31, no action or suit shall be prosecuted against any person in whose house or chamber any fire shall accidentally begin." It seems, therefore, that the compiler of that work, the first edition of which was published not many years after the passing of the statute, considered that this was the true construction. The clause imposing a pecuniary penalty upon the servant, where the fire is occasioned by his negligence or carelessness, and subjecting him, if it be not paid, to imprisonment and hard labour, does not affect the question.

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It is deserving of notice that the statute of Anne is confined to houses; but in the case of *Turbervill v. Stamp* the custom was held to apply to a case where the *fire was kindled in the defendant's close. If the Act, therefore, was intended to put an end to this peculiarity in the common law, it was obviously defective. But this defect seems, either intentionally or otherwise, afterwards to have been remedied by the subsequent statute 14 Geo. III. c. 78, which enacts that no action shall be brought against any person in whose house, chamber, or other building, or on whose estate, any fire shall accidentally begin, any law, usage, or custom to the contrary notwithstanding—thereby extending the provision to the case of a fire lighted in a close or field, apparently, as it was said at the Bar,

with the view of meeting the decision in the case of *Turbervill v. Stamp*. VISCOUNT
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Some decisions were cited in support of the construction contended for by the petitioner. An action was tried before Mr. Baron Alderson, at the Assizes for Berkshire a few years since, for negligence by the defendant in burning weeds in his field, whereby an adjoining plantation was destroyed. The jury, under the direction of the learned Judge, found a verdict for the plaintiff. The foundation of this action was negligence; and if the statute of Anne, and consequently the 14 Geo. III. c. 78, would have exempted the owner of a house from the consequences of his negligence, the latter statute would equally have protected the defendant in this instance. This, therefore, it was said was a direct authority against the construction put upon the statute of Anne by Sir William Blackstone. It is true that this was a *Nisi Prius* decision; but the case was afterwards cited in the Common Pleas in *Vaughan v. Menlove* (1), and appeared to have the sanction of the Judges of that Court. But the case of *Vaughan v. Menlove* was also an authority to the same effect. The defendant had negligently managed *a stack of hay on his premises, in consequence of which it took fire, and the plaintiff's property was thereby destroyed. By the statute, a party on whose estate a fire shall accidentally begin shall not be liable to an action for any damage which may be thereby occasioned. Sir William Blackstone's construction is, that although the fire be occasioned by the negligence of the party, he shall not be liable. In this case, however, the Court of Common Pleas decided otherwise, and judgment was given for the plaintiff. One of the Judges (Mr. J. BOSANQUET) stated that the course which a reasonably prudent and careful man would adopt is the criterion in the case of a fire kept in the house. The same principle, he observed, must govern the case then before the Court. It seems, therefore, to have been the opinion of that learned Judge that the master of a house would be responsible where the fire was occasioned by his negligence. And it appears by a recent case in the Common Pleas, that such is the law of Scotland. Upon neither of the above occasions, however, was any reference made to the statute, or the attention of the Court in any way called to it.

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Such was the general scope of the reasoning of the learned counsel upon this part of the case. It was argued at great length and with much ability and learning, and these observations will

(1) 43 R. R. 711 (4 Scott, 244).

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well deserve attention when a case shall occur requiring a decision of the question. It does not appear to me, however, that such necessity exists in the present instance; for even if I should be of opinion, in this conflict of authority, that the construction for which the petitioner contends is the true construction of the statute, I feel that I must still come to the conclusion that the petition cannot be maintained, and that the demurrer of the *Attorney-General* must be allowed.

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There is in the way of the petitioner a difficulty which struck me at the very commencement of the argument, and to which I have not had a sufficient answer. It is admitted that, for the personal negligence of the Sovereign, neither this nor any other proceedings can be maintained. Upon what ground, then, can it be supported for the acts of the agent or servant? If the master or employer is answerable upon the principle that *qui facit per alium, facit per se*, this would not apply to the Sovereign, who cannot be required to answer for his own personal acts. If it be said that the master is answerable for the negligence of his servant, because it may be considered to have arisen from his own misconduct or negligence in selecting or retaining a careless servant, that principle cannot apply to the Sovereign to whom negligence or misconduct cannot be imputed, and for which, if they occur in fact, the law affords no remedy.

Cases have arisen of damages done by the negligent management of ships of war. It has been held that where the act is done by one of the crew without the participation of the commander, the latter is not responsible (1). But if the principle now contended for be correct, the negligence of the seamen in the service of the Crown would raise a liability in the Crown to make good the damage, and which might be enforced by a petition of right. Though several cases of this nature have happened at different periods, it seems never to have occurred to the parties injured or to their advisers, that redress could be obtained by means of a petition of right. It would require, I think, some very precise and distinct authority to establish such a liability, and in the absence of any

[*322] such authority, I cannot venture, for the *first time, to lay down a rule which it is obvious would lead to such extensive consequences. I have not lost sight of the case of *Gervais de Clifton*, which was referred to as establishing this position, but I pass it by for the present, as I shall hereafter have occasion to advert to it.

(1) See *Nicholson v. Mounsey*, 15 East, 384.

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Another objection has been urged against the claim of the petitioner. If the case were between subject and subject, this objection would be fatal; and it is admitted, on the part of the petitioner, that he can only expect to succeed if he would have had a right to redress in an action against a private individual. Now, the cause of action arose in the time of the late King, and it is clear that had this been a case between subject and subject, an action could not have been supported, upon the principle that *actio personalis moritur cum personâ*. It is contended that a different rule prevails where the Sovereign is a party; but some authority should be adduced for such a distinction. It is true, indeed, that the King never dies; the demise is immediately followed by the succession; there is no interval. The Sovereign always exists; the person only is changed. But if there be a change of person, why is the personal responsibility arising from the negligence of servants (if indeed such responsibility exists) to be charged upon the successor, ceasing as it does altogether in the case of a private individual? In the case of a subject, the liability does not continue in respect of the estate; it devolves neither upon the heir nor the personal representative; it is extinct. I should find it difficult, therefore, in the case of the Crown, to say with any confidence that the liability continued and was transferred to the successor unless some distinct authority were shown in support of such a doctrine. Several cases were referred to for this purpose in the argument at the Bar; but they *were cases of grant, covenant, debt, or relating to the right of property, in which, from analogy to the case of a subject, the Crown might be liable in respect of the succession, and do not, I think, sufficiently establish the principle for which they were cited. The case of *Robert de Clifton*, to which I shall hereafter refer in connection with that of *Gervais de Clifton*, fails in respect of the fact, and does not support the position.

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Another objection arises out of the establishment of the Commissioners of Woods and Forests. Her Majesty, in imitation of the course pursued by her predecessors, has given up her territorial possessions to the public during her life; and Parliament has in exchange made a provision for the civil list and the personal expenses of the Sovereign out of the consolidated fund. For the purpose of managing these territorial possessions, and of executing such works as the civil service requires, Parliament has created certain public officers, viz., the Commissioners of Woods and Forests.

The salaries of these Commissioners and the expenses of the

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establishment, and of managing the business of this department, which is placed under the control of the Treasury, are defrayed out of the revenues arising from the property so surrendered, and are consequently paid by the public. These officers are appointed by the Crown, and are removable at pleasure. The subordinate agents are appointed by the Commissioners, and removable by them. The Crown has nothing to do with their appointment, or removal. It is by these agents that, according to the statement in the petition, the fire was occasioned.

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Now, assuming that the fire had been caused by the personal negligence of the Commissioners, would the *Crown, in such case, have been liable to make good the loss? They are, indeed, styled servants of the Crown; but they are, in truth, public officers appointed to perform certain duties assigned to them by the Legislature, and for any negligence in the discharge of such duty, and any injury that may be thereby sustained, they alone are, I conceive, liable. Is it supposed that the Crown is responsible for the conduct of all persons holding public offices and appointments, and bound to make good any loss or injury which may be occasioned by their negligence or delinquency? At least some authority should be cited in support of such a doctrine. But then it is said, these officers are appointed by the Crown, and are removable at the pleasure of the Crown. That circumstance alone will not, I conceive, create any such liability. The Keeper of the Great Seal and other persons holding high situations in the State have authority to appoint to many offices, and also to remove the persons so appointed at their pleasure. But they are not, on that account, subject to make compensation for injury occasioned by the neglect or misconduct of the persons so appointed. The mere selection of the officers does not create a liability. But if the Crown would not be responsible for the act done, had it been done by the superiors, it follows that it cannot be held liable for the negligence of their subordinate agents whom they appoint and remove, and with the selection or control of whom the Crown has no concern.

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The remaining question is as to the remedy by petition of right. Does it apply in such a case as the present? Staunford says, "Petition is all the remedy the subject hath when the King seizeth his land or taketh away his goods from him, having no title by order of his laws to do so, in which case the subject, for his remedy, is driven to sue unto his Sovereign lord *by way of petition only, for other remedy hath he not." He speaks of this proceeding as

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applicable to the illegal seizure by the King of the lands or goods of a subject: and although this is not conclusive against its application to other cases, yet no instance has been cited, with the exception of that of *Gervais de Clifton*, to which I shall presently refer, in which the remedy by petition of right has been attempted to be applied, to recover, not any property, but damages simply for a wrongful act alleged to have been committed by the Crown or its servants. It seems, indeed, to have been doubted whether a petition of right could even be maintained for a chattel or for any thing short of a freehold interest (1 Hen. VII., 3 Bro. Pet. 19); and although this opinion does not appear to be well founded (1), yet, coupled with the absence of any decision or *dictum* in favour of this attempt, it affords an argument against the application of this remedy to a case like the present. No industry has been wanting on the part of the petitioner. The Year Books, with the abridgments of Fitzherbert and Brooke, and other authorities, have been carefully searched, and no case has been found to warrant this proceeding. The decisions go back several hundred years, and in the absence of all precedent during so long a period, I think I should not be justified in deciding, for the first time, that such a proceeding can be maintained. Indeed, if the Crown cannot be guilty of negligence or personal misconduct, and is not responsible for the negligence or personal misconduct of its servants, it follows, of course, that in those cases there can be no such remedy; and, on the other hand, the absence of all trace of the remedy would itself afford a strong argument against the liability.

But the case of *Gervais de Clifton* is relied upon as a precedent in favour of the claim. That case, which stands by itself, occurred in the reign of Edward III. It went off at almost the earliest stage upon a point of form, viz. that the CHANCELLOR had sent the tenor of the verdict, instead of the verdict itself, into the Court of King's Bench. It led to no argument, to no discussion, and to no judgment. It is obvious that the defect in form might have been soon and easily removed; but no steps for this purpose appear to have been taken, and there is no trace of the claim having been afterwards prosecuted. No reliance can therefore be properly placed upon this proceeding.

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But a similar complaint appears to have been made upwards of twenty years before, viz. in the 18th of Edward II. by Robert

(1) Br. Abr. Pet. pl. 3, 34 Hen. VI. 51, 7 Hen. VII. 11, and the above passage in Staunford.

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de Clifton, at that time the owner of the property, and the nature of the complaint throws, I think, some light upon the other proceeding. The petitioner states, among other things, that trenches were dug and certain works erected by the wardens of Nottingham Castle, on the land of the petitioner, by which the waters of the Trent were diverted from their accustomed channel and made to flow over the petitioner's property, and that turves were taken from the petitioner's land to repair these works, and that his estate was, by these means, much injured, while the King's mills were greatly benefited. It appears, therefore, from this statement, that some of the works complained of were formed on the petitioner's land, and were kept up and repaired by the wardens of Nottingham Castle, who continually exercised acts of ownership for this purpose over the property, and that the works were necessary for the King's mills, four of which must, as it was stated, have been otherwise discontinued. There was, therefore, some *colour in this case for a petition of right; for the wardens had formed these works on the petitioner's land, and held and maintained them on account and for the benefit of the King. But still this does not appear to have been a petition of right. It is a petition presented in Parliament, and it recites a commission and inquisition, whereas, in a petition of right, the commission and inquisition are subsequent to, and consequent on, the petition: and the prayer is for a matter of pure grace and favour, viz. that the King would, as a compensation for the injury the petitioner had sustained, appoint him to the stewardship of the honour of Peveril, paying a small annual rent, as usual, into the Exchequer. The King directed, in answer, that the matter should be referred for inquiry to certain members of the Council.

But this case was cited for another purpose, viz. to show that a mere wrong committed in the time of one monarch, might be made the subject of a petition of right to his successor. It does not, however, answer this purpose; for, even assuming the alleged injury to have been the same as in the subsequent case of *Gervais de Clifton*, it was a continuing injury, and the inference therefore altogether fails. It may further be observed, in reference to the case of *Gervais de Clifton*, that if the wardens held and maintained on account of the Crown, and under a claim of right, the works formed and erected in the time of Robert, which is not improbable, this might have afforded some ground for the petition of right presented by Gervais.

I am compelled to come to the conclusion that this proceeding cannot be maintained, and that the demurrer of the *Attorney-General* must be allowed. It is a great satisfaction to me to know that in this singular and novel case, involving much that is obscure and almost obsolete, *if I am wrong in the opinion I have given (and I have formed it not without care and much anxious consideration), it is open to review by writ of error, should the petitioner be advised that there are sufficient grounds to question its correctness.

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MEEK v. KETTLEWELL.

(1 Phillips, 342—348.)

[A NOTE of the judgment on this appeal will be found at the end of the report of the case before Wigram, V.-C., taken from 1 Hare, p. 464. See 58 R. R. at p. 146.]

1843.
Feb. 15, 23,
24.
Dec. 6.

Lord
LYNDHURST,
L.C.
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PARKER v. MARCHANT.

(1 Phillips, 356—363; S. C. 12 L. J. Ch. 385.)

[SEE the report of this decision in the Court below taken from 1 Y. & C. C. C. 290, where a report of the judgment on this appeal will be found in 57 R. R. at p. 341.]

1843.
March 24, 29.
April 7, 8, 22.

Lord
LYNDHURST,
L.C.
[356]

ROBERTS v. MARCHANT.

(1 Phillips, 370—374.)

To a suit by the personal representative of a vendor of real estate for specific performance of the contract of sale, the real representative of the vendor is a necessary party.

THIS was a suit by the administrator of a vendor of real estate against the purchaser for specific performance of the contract of sale. The purchaser having by his answer suggested that the heir-at-law of the vendor was a necessary party, the plaintiff set the *cause down upon that objection, under the 39th Order of August, 1841, and Vice-Chancellor WIGRAM having allowed the objection, the plaintiff appealed from that decision.

The appeal now coming on to be heard,

* * * * *

1843.
Jan. 25.

WIGRAM,
V.-C.

On Appeal.
Nov. 11.

Lord
LYNDHURST,
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Mr. Wakefield and Mr. Rogers, in support of the appeal, [cited

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an unreported case] of *Williams v. Shaw* (1) before Sir J. Leach, where upon the death of a vendor who had filed a bill for specific performance against the purchaser, his executors revived the suit before decree, without making his heir-at-law a party. * * *

Mr. Tripp, contra.

Mr. Wakefield, in reply.

Nov. 11. THE LORD CHANCELLOR :

This was a suit by the administrator of the vendor against the purchaser of an estate for a specific performance of the agreement of sale. The defendant by his answer objected that the heir-at-law of the vendor ought to have been a party to the suit. The Vice-Chancellor WIGRAM allowed the objection. This is an appeal from that decision.

It was argued that by the contract the estate was converted into personalty, and that the heir-at-law had no interest in the matter. But that is to assume the very point in controversy, for the heir-at-law may dispute the contract and controvert its validity. It was further argued, that, as a general rule, it is not necessary to make parties to the bill those who are not parties to the contract: but that rule does not extend to representatives; and the *heir-at-law is the representative of the vendor as to the realty.

The cases which were cited do not apply. The mortgagee, it is said, need not be a party in a suit by the mortgagor. But his interest is not affected by the sale, and on payment of the mortgage money by the purchaser it entirely ceases. So, as to the cases where the sale is by a person holding the estate under a conveyance or a devise; the heir-at-law of the grantor or devisor need not be made a party: he does not claim through, or in any way represent, the vendor. I agree with the VICE-CHANCELLOR that the purchaser is not to be prejudiced by the death of the vendor, but is entitled to the same benefit from a decree as if it had passed against the vendor himself.

A case of *Williams v. Shaw* was cited in the course of the argument at the Bar, in which the VICE-CHANCELLOR is said to have decided, upon the objection being taken at the hearing, that the heir-at-law was not, in a case of this nature, a necessary party to the suit. That case was not mentioned in the Court below. Neither the argument at the Bar, nor the reasons of the

judgment, are stated. I do not think, if it had been referred to, it would, under these circumstances, have changed the opinion of that learned Judge in the present case. It has not altered mine.

ROBERTS
v.
MARCHANT.

Appeal dismissed.

IN THE MATTER OF THE PRINCESS BARIATINSKI (1).

(1 Phillips, 375—379.)

1843.
Dec. 21.

A commission of lunacy may issue against an alien.

The domicile of the party against whom a commission of lunacy is applied for, is not material to the question of jurisdiction, though it may be material to the question of discretion, if, for instance, the party has come here for a short time or for a particular purpose.

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THIS was a petition for a commission of lunacy. The lady, who was the subject of it, was the daughter of a Russian nobleman, and was born in Russia in the year 1807; but her mother, who was a daughter of Lord S., an English peer, having died in giving her birth, she was shortly afterwards sent over by her father to England, and committed to the care of her maternal grandmother and aunt, by whom she was accordingly brought up. Her father died in 1826; and in 1829, being about a year after she attained twenty-one, she exhibited symptoms of mental derangement, and soon afterwards became a confirmed lunatic, in which state, however, she continued to live under the care of her mother's family, without any application being made for a commission of lunacy, until the year 1843, when Prince Bariatinski, her half-brother, came over to this country, and claimed the custody and management of her person and property, insisting that by the laws of Russia he was entitled to it as the head of his family. In consequence of that claim this petition was presented by her maternal aunt, under whose care she was living; and the petition now came on to be heard together with a counter petition by Prince Bariatinski, which prayed that a commission might not issue, or if it did, that proper directions might be given as to who was to have the conduct of it; and that the petitioner might, in the meantime, be allowed access to the lunatic.

The fortune of the Princess was stated to consist of about 30,000*l.* in the British funds, and some real estate in Russia.

There being no dispute as to the fact of lunacy, the only questions were—

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First, as to the jurisdiction, having regard to the alienage of the

(1) *In re Burbidge* [1902] 1 Ch. 426, 71 L. J. Ch. 271, 86 L. T. 331 — C. A.

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Princess, and also to her domicile, respecting which there was a dispute whether it was English or Russian.

Secondly, supposing that a commission ought to issue, who was to have the conduct of it.

With respect to the latter point, it was stated in one of the affidavits that the lunatic had, in the year 1830, made a will in favour of her aunt, and that circumstance was urged as a ground for giving the conduct of the commission, if granted, to the Prince.

On the first question,

THE LORD CHANCELLOR said :

The domicile was immaterial to the question of jurisdiction, though it might be material to the question of discretion; if for instance the party had come here for a short time, or for a particular purpose.

With respect to the alienage,

It was admitted by the counsel who argued for the commission, that they had been unable to find any reported case in which an alien had been the subject of a commission of lunacy. * * *

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On the other hand it was insisted that by the law of Russia the Prince was entitled to the custody of his sister, and that the LORD CHANCELLOR had no right to interfere with a party on whom a foreign jurisdiction had already attached: *Dean of St. Paul's* case (1). The following passages also were cited from Vattel (2). "The State, which ought to respect the rights of other nations, and in general those of all mankind, cannot arrogate to herself any power over the person of a foreigner, who, though he has entered her territory, has not become her subject." . . . "Any power which the lord of the territory might claim over the property of a foreigner would be equally derogatory to the rights of the individual owner, and to those of the nation of which he is a member."

(THE LORD CHANCELLOR: That supposes that the proceeding is directed against the party: this is all for his benefit.)

* * * * *

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In the course of the argument the Secretary handed up to the Lord Chancellor a long list of cases in which commissions had issued against parties having foreign names, but in none of which it appeared whether the parties were aliens or not.

On the conclusion of the argument,

(1) Vin. Abr. tit. Lunatic (A. 3).

(2) Law of Nations, B. ii. Ch. 8.

THE LORD CHANCELLOR said :

I am satisfied, unless some authority can be cited to the contrary, that the Court has jurisdiction, and that it is its duty to throw protection around the person and property of an individual in this situation. The list of foreign names with which I have been furnished is not quite conclusive of the jurisdiction to grant a commission against an alien ; but it is very improbable that all those parties should have been subjects of this country. The Crown does not take possession of the lunatic's property for its own benefit ; but it takes it by its officers, for the purpose of applying the income to the party's maintenance and accumulating the surplus for him in case he recovers, or applying it according to the directions of his will, if he happen to have made one before he became insane. What can be more proper, what more humane, what more consistent with the general character of the law of England, than such a course?

I think, therefore, a commission ought to issue ; and I see no sufficient reason why the aunt who has hitherto *had the care of the lunatic, should not have the conduct of it ; but to guard against any thing improper, Prince Bariatinski shall have full opportunity of attending, and adducing such evidence as he may think necessary for the interest of the lunatic, and in the meantime he shall have access to her, (in company, of course, with the medical gentleman,) in order to prepare for the investigation.

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The *Solicitor-General*, Sir Charles Wetherell, and Mr. Walpole appeared in support of the petition for the commission.

Mr. Stuart and Mr. Walford for the cross petition.

COOPER v. EMERY.

(1 Phillips, 388—391 ; S. C. 13 L. J. Ch. 275 ; 8 Jur. 181 ; affg. 10 Sim. 609.)

Statutes of Limitation do not enable a vendor to commence his abstract of title within the period prescribed by law.

The right of a purchaser to a covenant for the production of documents constituting part of his title, does not extend to copies of Court rolls or indentures of bargain and sale enrolled, unless they are in the possession or power of the vendor.

A purchaser is not entitled as a matter of course to a covenant for the production of all documents contained in the abstract of title, which are not delivered to him, but only of those which are necessary to make out a good sixty years' title.

THIS was a suit, by a vendor against a purchaser, for specific performance of a contract for the sale of a small portion of an

1844.
Feb. 28.

On Appeal.
Lord
LYNDHURST,
L.C.

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EMERY.

estate formerly copyhold, but which had been enfranchised in the year 1799.

Two abstracts had been delivered; one relating to the copyhold title, and commencing with a surrender dated the 8th of May, 1736, the other relating to the title of the lord of the manor, and commencing with a settlement dated the 20th of March, 1736.

Under a reference to the Master to inquire whether the purchaser was entitled to any and what covenants, to produce any and which of the documents contained in these abstracts, the Master reported that he was entitled to a covenant for the production of one only. To that report the purchaser filed an exception, insisting that he was entitled to a covenant for the production of all the documents except a few of recent date, which, as they related exclusively to the piece of land in question, were to be delivered to him. Amongst the documents specified in the exception were several copies of the Court rolls and indentures of bargain and sale enrolled. The VICE-CHANCELLOR allowed the exception, observing that, according to the practice of conveyancers the purchaser was entitled to a covenant for the production of all the documents that were found in the abstract, on the ground that the vendor, by abstracting them, had shown that he considered them necessary to make out a good title.

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The plaintiff appealed from that decision.

The questions raised by the appeal were

First, whether the effect of the stat. 3 & 4 Will. IV. c. 27, had been to shorten the period for which a good title was required to be shown.

Secondly, whether the purchaser was entitled to the production of such of the documents mentioned in the abstract, as were copies of the Court rolls, or indentures of bargain and sale enrolled.

Mr. Bethell and *Mr. Stratton* for the appellant.

Mr. Walker and *Mr. Hopper* for the respondent.

Feb. 28.

THE LORD CHANCELLOR :

Several points, and points of importance, were argued upon this appeal. The first, and the most important, was the effect of the statute of 3 & 4 Will. IV. as to the period to which a good title should extend since the passing of that Act. It was supposed that, by the operation of that Act, it was not necessary that the title should be carried back, as formerly, to a period of sixty years, but

that some shorter period would be proper. It appears that conveyancers have entertained different opinions on the subject; but, after considering it, I am of opinion, that the statute does not introduce any new rule in this respect; and that to introduce any new rule shortening the period would affect the security of titles. One ground of the rule was the duration of human life; and that is not affected by the statute. It is true that, in other respects, the security of a sixty years' title is *better now than it was before. But I think that is not a sufficient reason for shortening the period—for adopting forty years, or, as it has been suggested by a high authority, fifty years instead of the sixty. I think the rule ought to remain as it is, and that it would be dangerous to make any alteration.

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Another question is, whether the purchaser is entitled in this case to a covenant for the production of copies of the Court rolls. If the vendor has these copies, or if they are in his power, he is bound to produce them; but if not, I think the purchaser is not entitled to call for a covenant to produce them; because he may at any time resort to the rolls themselves and make use of them in evidence. I think that is quite sufficient, and I believe that is also the opinion of the most eminent and experienced conveyancers.

Then with respect to the indenture of bargain and sale, if it be a bargain and sale within the statute 10 Ann. c. 18, it falls within the same principle as the copies of Court rolls, because the purchaser may always have access to the enrolment, and by the statute the copy of the enrolment is made evidence.

I do not think, (and I say this with great deference, from the experience, in this branch of learning, of the VICE-CHANCELLOR), I do not think that merely because an instrument is stated in the abstract of title, it therefore follows that the purchaser is entitled, as a matter of course, to a covenant to produce it. Such a rule would be injurious to purchasers themselves: for it would induce parties to withhold all information, but what they were strictly bound to give.

The result therefore is, that the purchaser is entitled to a covenant for the production of all the documents *contained in the abstract, which are necessary to make out a good sixty years' title, except such as being copies of Court rolls, or indentures of bargain and sale enrolled within the statute of Anne, are not in the possession or power of the vendor.

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FOLEY *v.* HILL.

1844.
March 1, 14,
15.

(1 Phillips, 399—407; S. C. 13 L. J. Ch. 182; 8 Jur. 347; affd. 2 H. L. C. 28.)

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[AFFIRMED in 1848 on appeal to the House of Lords, as reported in 2 H. L. C. 28, to be contained in a later volume of the Revised Reports.]

BULWER *v.* ASTLEY (1).

1843.
May 31.
On Appeal.

(1 Phillips, 422—435; S. C. 13 L. J. Ch. 329; 8 Jur. 523.)

1844.
April 17.
Lord
LYNDHURST,
L.C.
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A., by several deeds of the same date, granted, for valuable considerations, several annuities or rent-charges for lives, to be issuing and payable out of certain real estates, of which he was the owner, reserving to himself and his heirs, in each case, a power to repurchase the annuity, on payment, at three months' notice, of the original price, together with a half-yearly payment of it in advance. Each annuity was secured by the personal covenant of the grantor, by clauses of distress and entry in case it should be a certain number of days in arrear, and by a warrant of attorney to confess judgment against the grantor for double the original price. And by another deed of even date which recited the annuities as being respectively subject to "a proviso for redemption or repurchase," the real estates on which they were charged, were conveyed to trustees for a term of years, with a power of sale to secure the regular payment of them, and subject thereto on trust for the grantor. The grantor by his will charged his real estates in aid of his personal estate with the payment of his debts, other than mortgage debts, and subject thereto, devised them in strict settlement.

Held (reversing the judgment below), that the annuities were to be treated as securities for the repayment of loans, and consequently that the value of them (there being no personal assets for their payment) was, by virtue of the will, a charge upon the *corpus* of the real estates, and that the tenant for life of the real estates, as between him and the remainder-man was only liable to keep down the interest on the value.

WILLIAM EARLE BULWER, by his will, dated the 21st of February, 1808, directed that his funeral and testamentary expenses, and all his debts and legacies should be paid and satisfied as soon as conveniently might be after his death. He then gave several pecuniary legacies and annuities, and authorised and empowered his executors to provide funds for answering the several annuities thereby given, either by investing so much money in the purchase of stock in the public funds or on real securities, as would produce an annual income sufficient to discharge the same respectively (which money so to be invested, was, after the determination of such respective annuities, to return to and become part of his personal estate for the purposes of that his will), or by sinking money in the purchase of annuities during the lives of the annuitants respectively, or by any other advisable method, at the discretion of his executors.

(1) *Re Muffet* (1888) 39 Ch. D. 534, 57 L. J. Ch. 1017, 59 L. T. 499.

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He then devised all his real estates to his executors, upon trust in the first place to raise by mortgage a sum sufficient in aid of his *personal estate, to pay and discharge his debts, except those due on mortgage, and the annuities and legacies thereby given, and his funeral expenses ; and upon further trust, out of the annual rents, and profits, to raise and levy the yearly sum of 500*l.* to form an accumulating fund for the payment of the principal of the mortgage debts which should be charged on his real estates at the time of his death, until they were all paid off ; and subject to such trusts, he directed that his trustees should hold the estates on trust for the plaintiff for life, with remainder for his first and other sons in tail with several remainders over.

At the time of the testator's death, which happened in the year 1807, his real estates were subject to a great number of mortgages, and they were also charged with certain annuities or rent-charges which he had granted by indentures for valuable considerations.

By one of those indentures, dated the 22nd of August, 1806, and made between William Earle Bulwer (the testator) of the one part, and John Bentley and Kirk Boott of the other part, after reciting a memorandum of agreement dated the 12th of July, 1806, by which it was agreed that W. E. Bulwer should on or before the 12th of August then next, or as soon afterwards as conveniently might be, in consideration of the sum of 3,500*l.* to be paid by the said J. Bentley and K. Boott in equal proportions, convey and assure unto the said J. Bentley and K. Boott as tenants in common, their respective executors, administrators and assigns, an annuity or clear yearly rent-charge of 389*l.* for the lives of four persons to be nominated by the said J. Bentley and K. Boott, and the life of the survivor, such annuity or rent-charge to be charged upon and issuing and payable out of the hereditaments and premises thereafter mentioned ; and *that all expenses attending the sale and purchase of the said annuity, and of investigating and perfecting the title to the estates upon which it was to be secured, should be borne and paid by the said W. E. Bulwer ; and that it should be lawful for the said W. E. Bulwer, his heirs, executors, administrators and assigns, to repurchase and buy up the said annuity or rent-charge upon the terms and conditions thereafter mentioned. And further reciting that, in part performance of the said agreement, the said W. E. Bulwer had executed a warrant of attorney, bearing even date with that indenture, to confess judgment against him at the suit of the said J. Bentley, and K. Boott for the sum of 7,000*l.* and costs of

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suit, for better securing the due payment of the said annuity or rent-charge, at or on the days and times and in manner thereafter mentioned. It was witnessed that in further pursuance and performance of the said agreement and in consideration of the sum of 8,500*l.* then paid by the said J. Bentley and K. Boott in equal proportions to the said W. E. Bulwer, he the said W. E. Bulwer did grant, bargain, sell, and confirm unto the said J. Bentley and K. Boott, as tenants in common, their respective executors, administrators and assigns, one clear annuity or yearly rent-charge of 389*l.*, to be charged upon and to be issuing and payable during the term of 99 years if four persons therein named, or the survivors or survivor of them, should so long live, from and out of the hereditaments and premises therein mentioned, and to be payable by two equal half-yearly payments on the 22nd of February and the 22nd of August in every year, with a proportional part of the said annuity or rent-charge from such of the said half-yearly days of payment as should next precede the death of such survivor. And the said W. E. Bulwer thereby covenanted that if the said annuity or rent-charge should be unpaid by the space of fourteen days after any of the days appointed for the payment thereof, it should be lawful for the said J. Bentley *and K. Boott, their respective executors, &c. to enter into and distrain upon the said hereditaments and premises for the amount so in arrear, and all costs &c., and if the said annuity or rent-charge should be unpaid by the space of twenty-eight days, it should be lawful for them to enter upon the said hereditaments and premises, and to receive and take the rents and profits thereof until they should thereby be paid and satisfied the said annuity or rent-charge, and the arrears thereof, and all costs &c. And the said W. E. Bulwer further covenanted to pay the said annuity or rent-charge, and such proportional part thereof as aforesaid, at the days and times, and in manner thereinbefore mentioned. And the said J. Bentley and K. Boott also covenanted that if W. E. Bulwer, his heirs, executors, or administrators should, at any time after the 12th of August, 1808, be desirous of repurchasing the said annuity or rent-charge, and should give to the said J. Bentley and K. Boott their respective executors, administrators, or assigns, three calendar months' notice in writing of such desire, and upon the expiration of such notice or at any time afterwards, upon giving three calendar months' such notice, should pay to the said J. Bentley and K. Boott, their respective executors, &c., the sum of 3,694*l.* 10*s.* being the original purchase-money of the said annuity or rent-charge,

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and one half-yearly payment thereof in advance, together with all arrears that should then be due on the said annuity, and also a proportional part of the same from the last day of payment thereof preceding such repurchase, up to and inclusive of the day of payment of such repurchase-money, and all costs which should have been incurred in recovering the payment of the said annuity when in arrear, then the said J. Bentley and K. Boott, their respective executors &c., should and would accept the said sum of 3,694*l.* 10*s.* as and for the price of repurchase and in satisfaction and full discharge *of the said annuity, and then and from thenceforth the said annuity or rent-charge, and all payments in respect thereof, and all powers and authorities therein contained for recovering the same, should cease and determine, and the said J. Bentley and K. Boott, their respective executors, &c., should and would at the costs of the said W. E. Bulwer, his heirs &c., deliver up the said indenture to be cancelled, and acknowledge satisfaction on the record of the said judgment.

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By another indenture of the same date and in the same form as the last, the same estates were, in consideration of 500*l.*, charged with an annuity of 55*l.* 11*s.* for three lives, to one Cordelia Skeeles. And both those annuities were further secured by an indenture of demise of the same date, by which the estates out of which the annuities were made payable, were conveyed to trustees for a term of 3,000 years on trust for sale, in case either of the annuities should at any time be sixty days in arrear, and in the meantime on trust for the testator (1).

This suit was instituted in the year 1808 (the plaintiff being then an infant) for the execution of the trusts of the will. The Master, in his report upon the usual reference as to the debts due from the testator at the time of his death, made no mention of the annuities, but in his report under another reference he included the annuities granted by the testator during his lifetime, as well as those bequeathed by his will, amongst the incumbrances affecting the real estates.

At the hearing of the cause for further directions before the Vice-Chancellor (Sir J. Leach) on the 8th of *March, 1822, being two years after the plaintiff had attained twenty-one, an order was made, by which it was amongst other things declared, that the plaintiff,

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(1) This indenture, in reciting the former ones, spoke of the clause of repurchase sometimes as "a proviso for redemption or repurchase," and sometimes as "a proviso for redemption."

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having been let into the receipt of the rents and profits of the real estates, was bound to keep down the annuities from the time he attained his age of twenty-one. And shortly after the date of that order, an Act of Parliament was obtained, under the sanction of the Court, and at the instance of the plaintiff, by which the real estates of the testator were vested in certain persons on trust, by a transfer or consolidation of the existing mortgages, or by a new mortgage, and, subject to such mortgages, by a sale of certain parts of the estates, to raise a sum of money sufficient to pay off all the mortgages and incumbrances mentioned in the Master's report (except annuities), including the specialty and simple contract debts of the testator.

The plaintiff continued to pay the annuities out of the rents and profits of the estates, in pursuance of the order of the 8th of March, 1822, down to the year 1842, when he presented a petition of rehearing against so much of that order as directed him to keep down the annuities; alleging that as to the annuities granted by deed he had only lately discovered, by inspection of the deeds, which had been brought into the Master's office for the prosecution of some recent enquiries, that those annuities, although secured on the real estates, were in fact debts of the testator, to which he had made himself personally liable, and therefore contending that they ought to have been provided for under the general charge in the will for the payment of the testator's debts, and that the annuities bequeathed by the will ought also to have been raised and provided for out of the personal estate or by a mortgage of a sufficient part of the real estates according to the directions of the will, and that the *value of the annuities at the time when the plaintiff came of age ought now to be ascertained; and that he ought to be charged with interest only, at 4 per cent., on such value, and to be reimbursed out of the estate what he had overpaid.

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The appeal now came on to be heard.

Mr. Tinney, Mr. Humphry, and Mr. Blunt, for the appellant, the tenant for life :

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* * The effect of the transactions was, to establish the relation of debtor and creditor between the parties. It is true that the lender had not the right, usually incident to that character, of recovering the money advanced, inasmuch as the contract gave to the borrower the option of repaying the loan, either in a gross sum or in the form of an annuity: but the relation of debtor and

creditor did not the less subsist, because the rights and remedies usually incident to it were modified by the peculiar terms of the contract. * * The result is, that, at the time of the testator's death, the annuities constituted debts within the meaning of the charge in the will, and as such ought to have been provided for out of the *corpus* of the real estate, there being no personal assets for their payment.

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Mr. Roupell and *Mr. Collyer*, for the respondent, the remainderman in tail:

* * The sale of an annuity with a power of repurchase was [formerly] looked upon as usurious, and on that ground the Court allowed such an annuity to be redeemed upon the principle of an ordinary mortgage, that is, by treating the past payments of the annuity as payments on account of interest and principal. But that doctrine has long since been exploded. * * “An annuity, granted subject to a clause of repurchase, differs from a mortgage or security for money in these points: in a mortgage the principal debt still continues, until the equity of redemption be foreclosed; but upon the purchase of an annuity the principal is gone for ever, and consequently, if the repurchase be made, the money paid upon that occasion is not in discharge of a debt, but as the consideration for a new purchase.” * * *

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There is no debt until the annuity is in arrear, and then only for the *amount of the arrear. How, then, can the present value of these annuities at the testator's death, or at any other period, be considered debts within the meaning of the charge in the will? What the testator has directed is, that his debts shall be paid and satisfied, and it will not be contended that, under that direction, the executors would have been warranted in repurchasing the annuities: but yet that is the only way in which, if considered as debts, they could have been “paid or satisfied.” Those words alone, are sufficient to show that the testator could not have intended to include these annuities under the description of his debts.

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Mr. Tinney, in reply.

THE LORD CHANCELLOR:

I think the annuity or rent-charge in this case was only a security for the money advanced, and that it was so intended by the parties. The mode of borrowing money upon annuity is of common occurrence. The effect of the transaction is, that the money borrowed

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is to be repaid by instalments, consisting partly of interest and partly of principal: whether the annuity be for a term of years or for a life or lives, the transaction is in substance the same. The value of the life, in respect of its probable duration, is a matter of calculation, and, as the principal is put in hazard, the amount of the interest is not regulated by the Statute of Usury, which is the only material distinction.

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In the case now before the Court, the deed contains a clause for the repurchasing of the annuity, which cannot, I think, in this case be distinguished from a clause of redemption, which has always been considered a very strong, if not a decisive circumstance, to show that the transaction was in reality a loan, and that the conveyance *was intended only as a security. In *Floyer v. Sherard* (1), Lord HARDWICKE took the distinction between a sale of an annuity absolutely, and the sale of a redeemable annuity, which, he said, was considered by the Court as a loan.

Here the sum stipulated to be paid for the repurchase is “to be accepted and taken in satisfaction and full discharge of the annuity, yearly rent-charge, &c., and all powers for enforcing it shall thenceforth cease and determine,” &c. Although the word repurchase is used, this is in substance a stipulation for redemption: it would, I think, be difficult to construe it otherwise; and in fact in the indenture of demise between the same parties, and part of the same transaction, the proviso is described as a proviso for repurchase or redemption; and this is several times repeated, using the words indiscriminately and in the same sense—a circumstance which also occurred, and was relied upon by the Court, in *Longuet v. Scawen* (2). In that case Lord HARDWICKE is reported to have said, “It is well known that the Court leans extremely against contracts of this kind, where the liberty of repurchasing is made at the same time and concomitant with the grant.” “There is, indeed,” he observes, “a distinction in the nature of the transaction between a power of redeeming and of repurchasing, obtained by usage which governs the sense of words: but where the stipulation for the liberty of repurchasing is part of the same transaction, the Court goes very unwillingly into that distinction, and endeavours, if possible, to bring them to be cases of redemption.” This principle applies directly to the present case: the stipulation for the repurchase or redemption (for the terms are used synonymously) was contemporaneous with the grant, and a part of the same transaction.

The deed also contains a stipulation similar to one relied upon by the same learned Judge in the case of *Lawley v. Hooper* (1), viz. the notice required of the intention to repurchase, and the condition for the repayment of the original purchase-money, with all arrears, and half a year's interest in addition: so as to allow ample time, according to the expression there used, "to find out another hand to take the money," and to be secure of the interest in the meantime: *Mellor v. Lees* (2).

It is not immaterial to advert to the personal covenant for payment of the annuity. In the event of any omission, an action might be immediately brought upon this covenant; but there would be no present remedy against the property: the clause of distress could not be enforced until fourteen days after default made, the power of entry not till twenty-eight days, and the authority to sell not before sixty days. This leads to the inference that the estate was looked to in this transaction only as a security. The personal estate having been augmented by this advance, that estate would of course be the primary fund to discharge the claim.

With respect to the Act of Parliament, it does not appear to me to affect the question, which is merely as to how the debt is to be paid as between the tenant for life and the persons in remainder.

I have mentioned only one annuity: there are in fact several, but they all depend upon the same principle. The result is, that the decree should have directed the annuities to be valued, and the tenant for life to keep down the interest of the estimated value.

It was admitted, I think, that the decree must be varied as to the annuities given by the will.

STEELE v. STEWART (3).

(1 Phillips, 471—475; S. C. 14 L. J. Ch. 34; 9 Jur. 121; affg. 13 Sim. 533.)

Where the circumstances of the case render it necessary for a party or his solicitor to employ an agent to collect evidence in support of legal proceedings, the communications of the agent to his principal relating to that evidence are privileged.

THE plaintiff was an underwriter of a policy of insurance effected by the defendant on a ship which was lost on her passage from Calcutta to England. The defendant having brought an action on

BULWER
v.
ASTLEY.
[435]

1843.
Nov. 23.
Dec. 5.
—
SHADWELL,
V.-C.
On Appeal.
1844.
Nov. 14.
—
Lord
LYNDHURST,
L.C.
[471]

(1) 3 Atk. 278.

(2) 2 Atk. 494; see p. 496.

(3) *Anderson v. Bank of British*

Columbia (1876) 2 Ch. D. 651, 45
L. J. Ch. 449, 35 L. T. 76.

STEELE
STEWART.

the policy, the plaintiff pleaded that the ship was not sea-worthy; and, in support of that defence, he filed this bill for discovery, a foreign commission, and an injunction. Among the documents admitted by the answer to be in the defendant's possession relating to the matters in question, were seven letters, as to which the first answer stated, in substance: That a person named Warren, who was the master of the ship, was sent out to India by the defendant, at the suggestion of his solicitors, for the express purpose of collecting evidence on his behalf in support of the action, and that he was engaged there for two years and upwards in collecting such evidence; *and that as many of the witnesses were natives of India, and had been employed by Warren in the repair of the ship, it would have been impossible without his presence and assistance to have obtained the evidence necessary to maintain the action; and that the letters in question were written by Warren, while he was absent on that mission, partly to the defendant, and partly to his solicitors; and the defendant submitted that the letters were confidential, and that he was not bound to produce them. In a further answer he stated that the letters in question were written by the master to the defendant and his solicitors in this country, while he was acting by the direction and as the agent of the defendant and his solicitors in procuring evidence in support of the action, and that the contents of the letters related to and concerned such evidence.

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A motion for the production of these letters, having been refused by the VICE-CHANCELLOR OF ENGLAND, was now renewed, by way of appeal, before the Lord Chancellor.

Mr. Bethell and *Mr. Hetherington*, in support of the motion, stated that the VICE-CHANCELLOR, when he made the order, acknowledged that, in protecting from production communications between the party or his solicitor and an unprofessional agent, he was extending the privilege beyond the limits to which it had hitherto been carried; and they contended that such extension of it was not authorised by the principle of public policy on which it was founded. They also commented on the statements in the answers as being inconsistent with each other, insisting that, from those statements, it was uncertain whether Warren was the agent of the defendant or of his solicitors, and consequently whether, in making the communication in question, he had in fact acted as agent for either of them.

Mr. Romilly and Mr. Lewis, contra.

STEELE
v.
STEWART.
[473]

[*Bunbury v. Bunbury* (1), *Hughes v. Biddulph* (2), *Taylor v. Forster* (3), *Combe v. Corporation of London* (4), *Llewellyn v. Badeley* (5), and other cases were cited.]

THE LORD CHANCELLOR :

1844.
Nov. 14.
—

In this case an action had been brought in the Common Pleas by the defendant against the plaintiff Steele on a policy of insurance effected on the ship *Sherburne* for twelve months, at and from Calcutta, &c. The defence relied upon was, that the ship was not sea-worthy. The present bill was filed for discovery, a commission, and an injunction. The plaintiff moved for the production of the letters, papers, &c. admitted by the defendant's answer, and the schedules thereto to be in his possession or power. The question is confined to certain letters, the dates of which are set forth in the further answer of the defendant. He contends that he is not bound to produce these letters.

The answer admits that Warren, the master of the ship, was sent out to India by the defendant at the suggestion of the defendant's solicitors, for the express purpose of collecting evidence on behalf of the defendant in support of the action, and that he was engaged there for two years and upwards, in collecting such evidence, and that as many of the witnesses were natives of India, and had been employed by Warren in the repair of the *ship, it would have been impossible without his presence and assistance, to have obtained the evidence necessary to maintain the action. In a subsequent part of the answer, the defendant states, "that during the period the master was absent for the purpose of obtaining evidence in support of the action, he wrote and sent to the defendant, and also to his solicitors, divers letters, on the subject of such evidence, and the same were duly received by him, the defendant, and his solicitors, and are in the possession of the defendant's solicitors, but the defendant submits that such letters are confidential communications, and that he is not bound to produce and ought to be protected from producing the same, and that he is not bound to answer whether such letters or any of them relate, or in some or what manner refer, to the state of repair, or otherwise to matters in the said bill inquired after." The defendant, in his further

[*474]

(1) 50 R. R. 147 (2 Beav. 173).

(2) 28 R. R. 46 (4 Russ. 190).

(3) 31 R. R. 659 (2 Car. & P. 195).

(4) 57 R. R. 482 (1 Y. & C. Ch. 150).

(5) 58 R. R. 174 (1 Hare, 527).

STEELE
v.
STEWART.

answer, states that "the letters in question were written by the master to the defendant and his solicitors in this country whilst he was in Calcutta, acting by the direction and as the agent of the defendant's said solicitors in procuring evidence in support of the action in the amended bill mentioned, and that the contents of the letters relate to and concern such evidence." It does not appear to me that there is any inconsistency in these statements. He might have been sent out by the defendant for the purpose of collecting evidence on behalf of the defendant, at the suggestion and by the advice of the defendant's solicitors, and might, in collecting such evidence, have acted under the direction and as the agent of the solicitors. The single question therefore is whether letters, written under these circumstances, are privileged communications.

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First, as to the letters written by the solicitor's agent to the defendant. When a solicitor is employed to *collect evidence for his client in a pending suit, it is clear that his communications with his client respecting such evidence are privileged. But a solicitor cannot always act in his own person in the collection of evidence. Distance and other circumstances may render this impossible. Such was the case here: the witnesses were many of them native Indians, and a voyage to India was required for that purpose. It was necessary, therefore, that the solicitor should employ an agent, and whether that agent was a clerk to the solicitor or any other person appears to me wholly immaterial. In performing this duty he represented the solicitor, and his communications to the client, on the subject of the evidence, were the communications of the solicitor, falling within the same principle and entitled to and requiring the same protection.

As to the letters addressed to the solicitors by their agent, they would also be privileged, being written in pursuance of inquiries instituted by, or under the direction of, the solicitors, as to evidence in support of the action.

I agree, therefore, with the VICE-CHANCELLOR, in thinking that these letters ought not to be produced. I do not, however, concur with that learned Judge, in considering this an extension of an admitted principle. I consider the case as coming within the same principle on which the communication of the solicitor himself would, under similar circumstances, be privileged (1).

(1) See the next case.

HOLMES v. BADDELEY AND OTHERS.

(1 Phillips, 476—483; S. C. 14 L. J. Ch. 113; 9 Jur. 289; revg. 6 Beav. 521.)

Letters written or cases stated for the opinion of counsel by a party or his solicitor, with a view to a suit then in contemplation, are privileged from production, not only in that suit but in any subsequent litigation with third parties respecting the same subject-matter, and involving the question to which the letters and cases relate.

1844.
Jan. 31.
Feb. 24.
On Appeal.
Nov. 23.
—
Lord
LYNDHURST,
L.C.

[476]

By the settlement made on the marriage of Roger Holmes and Susannah Abney in the year 1772, a real estate, called Mill Farm, the property of Susannah Abney, was conveyed to the use of Roger Holmes for his life, with remainder to Susannah Abney for her life, with remainder to the use of the first and other sons of the marriage in tail general, with remainder to the use of the daughters of the marriage as tenants in common in tail general, and, in default of such issue, to the use of Roger Holmes in fee.

The only issue of the marriage were two daughters, Susannah and Ann.

Roger Holmes, by his will, dated the 8th of October, 1778, devised all his real estates to trustees in trust, in case two or more of his children by his marriage with his then wife should live to attain the respective ages of twenty-one years, for such children, their heirs and assigns, as tenants in common; but in case there should be no such child who should live to attain that age, and from and after default of such issue, he devised his estate, called Mill Farm, and all his estate, right, title, and interest therein, whether in possession, reversion, remainder, or expectancy, to the only proper use and behoof of his said wife, her heirs and assigns.

Roger Holmes died within a month after the date of his will, leaving his widow, Susannah Holmes the elder, and his two daughters, Susannah Holmes the younger *and Ann Holmes surviving him. The widow died in the year 1800. Both the daughters attained twenty-one, and died intestate and unmarried, and without having barred the estate tail under the settlement. On the death of Susannah, the survivor of them, in the month of June, 1838, three parties laid claim to the estate. The testator, Roger Holmes, had a brother Edward Holmes, who had a son Edward Holmes the younger, and several daughters. The plaintiff in this suit claimed as the only son and heir of Edward Holmes the younger. The defendants claimed under the daughters of Edward Holmes the elder, insisting that the plaintiff was an illegitimate

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v.
BADDELEY.

child. The third claim was made by one Ann Heming, as heiress-at-law of Susannah Holmes the younger, *ex parte maternâ*.

In the month of December, 1839, a deed of compromise was executed between the plaintiff and the defendants in this suit, under which the estate was to be sold, and the proceeds to be divided between them in certain proportions.

The bill alleged that the plaintiff had been induced to accede to the compromise by fraud, and it prayed that the defendants, who were alleged to be in possession of the estates, might deliver them up to the plaintiff.

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The defendant Baddeley and wife by their answer, after referring to the claim of Ann Heming, stated that, after the execution of the deed of compromise, and before the plaintiff had disputed its validity, the defendants had applied to the heir of the surviving trustee of Roger Holmes's will, in whom the legal estate of the property was vested, for a conveyance of such estate; *but that in consequence of Ann Heming still persisting in her claim, the application was refused, and that afterwards the plaintiff, in collusion with Ann Heming, obtained an assignment of the legal estate to certain persons as trustees for them, on the faith of a fraudulent representation that the defendants had abandoned their claim; and that by means of that estate they had got into possession of the property; and that the defendants had, since the institution of this suit, filed a cross bill against the devisee of Ann Heming (who was dead), and against the plaintiff and the other defendants in this suit, praying that the heirs, *ex parte paternâ*, of Susannah Holmes the younger might be declared entitled to the estate, and that the same might be conveyed by all proper parties to the trustees of the deed of compromise.

In answer to the usual charge as to documents, &c. they stated that they had in their possession certain letters, and copies of letters, which had passed, since the death of Susannah Holmes, between their solicitors as such, and various persons, and also two cases on behalf of the defendants, with counsel's opinion thereon; which cases were laid before counsel, and all of which letters were written and sent after the defendants were aware that a claim to the estate, adverse to their title, was about to be made on the part of Ann Heming as heir *ex parte maternâ*, and in contemplation of legal proceedings to enforce their title, and the greater number thereof after the said claim had actually been made on the part of Ann Heming, and with reference to such claim, and to the right and

title of the defendants in issue in this cause and in the cross cause, and wholly independent of the compromise by the plaintiff's bill sought to be set aside, and without any reference thereto. And they submitted that the said cases, *opinions, and letters, were privileged communications, which they were not bound to produce.

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BADDELEY.

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The MASTER OF THE ROLLS having ordered those letters and cases to be produced, the defendant Baddeley and his wife moved before the Lord Chancellor that that order might be discharged.

Mr. Bethell and *Mr. G. Russell* appeared in support of the motion.

Mr. Bird, contra.

[The principal cases cited are referred to in the following judgment:]

THE LORD CHANCELLOR :

Nov. 28.

In this case the plaintiff claims an estate as heir-at-law to Susannah Holmes, and he seeks to set aside a deed by which he had compromised this claim, as having been fraudulently obtained. The defendants deny the fraud, *and dispute the plaintiff's legitimacy. They also claim as heirs-at-law of Susannah Holmes. Soon after Susannah Holmes' death a right to the estate was advanced by Ann Heming: she claimed to be the heir-at-law *ex parte maternâ* of Susannah Holmes; and her claim to the estate was founded upon the terms of the will of Roger Holmes, the father of Susannah.

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Cases were laid before counsel by the defendants, and opinions obtained upon the question, and several letters passed between the defendants' solicitors and different persons respecting the defendants' right to the property. These opinions were obtained, and this correspondence carried on, in contemplation of legal proceedings against Ann Heming. The question is whether they ought to be produced in this suit.

[His Lordship then read the passage of the answer, and proceeded:]

First, then, as to the cases and opinions: it is clear that in the contemplated suit between the defendants and Ann Heming respecting this property, the cases and opinions would have been privileged, and the defendants would not have been obliged to produce them. The principle upon which this rule is established is that communications between a party and his professional

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advisers, with a view to legal proceedings, should be unfettered ; that they should not be restrained by any apprehension of such communications being afterwards divulged and made use of to his prejudice. To give full effect to this principle it is obvious that they ought to be privileged, not merely in the cause then contemplated or depending, but that the privilege ought to extend to any subsequent litigation with the same or any other party or parties. [His Lordship then referred to similar judicial opinions expressed by Lord ABINGER in the case of *Knight v. The Marquis of Waterford* (1), and by KNIGHT BRUCE, V.-C., in the case of *Combe v. The Corporation of London* (2), and said :]

[481] In those opinions I concur, and upon the principle to which I have already referred as the admitted ground upon which the privilege is allowed. The cases are stated to have been prepared, and the opinions taken, “after the defendants were aware that a claim, adverse to their title, was about to be made on the part of the heir *ex parte maternâ*, and in contemplation of legal proceedings being taken by the defendants to enforce their title, and occasioned by and with reference to the right and title of the defendants in issue in the present cause and in the cross cause.” In *Bolton v. The Corporation *of Liverpool* (3), the cases and opinions which were ordered to be produced were not stated in the answer (according to Mr. Simons’ Report) to have been prepared and taken in contemplation of any legal proceedings by or against the corporation. There are undoubtedly some expressions attributed to the VICE-CHANCELLOR in that case, and also to the LORD CHANCELLOR, which, literally taken, might lead to the conclusion that they considered the privilege to be confined to the particular suit which was expected or depending when the opinions were taken. But no such question was, with reference to these cases and opinions (the cases and opinions ordered to be produced), sufficiently raised by the answer, as stated in the report, and the objection to produce them was rested entirely on other grounds. In the case of *Hughes v. Biddulph* (4) it was decided that communications between the defendant and his solicitor, either during a cause, or with reference to it, ought to be protected ; that was all which was necessary to determine for the purpose of the motion then before the Court.

But it is said, the subject in controversy with Ann Heming, though it related to the same property, was not the same as in the

(1) 47 R. R. 330 (2 Y. & C. (Ex. Eq.)). (3) 36 R. R. 251 (1 My. & K. 88).
(2) 57 R. R. 482 (1 Y. & C. Ch. 648). (4) 28 R. R. 46 (4 Russ. 190).

present suit. Even supposing this to be a material distinction, it is sufficient, I think, to observe that the defendants in their answer state "that the opinions were taken in contemplation of legal proceedings to enforce their title:" they must, therefore, have not only shown that the heir *ex parte paternâ* had the right, but that they filled that character—one of the points in controversy in the present suit. The answer further states that the cases and opinions had reference to the title of the defendants "at issue in the present cause." In the cross cause, to which the devisee under the will of Ann Heming, is a party, the *plaintiffs pray, among other things, a declaration that, on the death of Susannah Holmes, the plaintiffs and the other co-heirs became absolutely entitled to the estates in question, and also a declaration in substance that, by the will of Roger Holmes, the estates descended to the heirs, *ex parte paternâ*, of Susannah Holmes. No answer had been filed in that cause when the present motion was made. The very question in dispute with Ann Heming may be raised in that cause; and if the cases and opinions are produced in the original cause they may disclose circumstances by which the defendants in this cause may be prejudiced in the cross cause. I think the cases and opinions, therefore, ought not to be produced. No attempt was made at the Bar to distinguish the correspondence from the cases and opinions. I think it falls within the same principle, and that it ought not to be produced: *Curling v. Perring* (1).

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SHEFFIELD CANAL COMPANY v. SHEFFIELD AND ROTHERHAM RAILWAY COMPANY.

(1 Phillips, 484—492; S. C. 3 Rail. Ca. 133; 12 L. J. Ch. 376.)

Under the usual order for the production of books, &c., with liberty to seal up on affidavit such parts as did not relate to the matters in question, the defendant Company had produced a book with certain pages sealed up, and had made the required affidavit. The plaintiffs afterwards on an affidavit of facts leading strongly to the inference that the Company had passed a material resolution which ought to have been recorded in one of the pages sealed up and which related to the question in dispute, moved that the defendants might produce the book unsealed; but the motion was refused, although the defendants declined to answer the affidavit.

In this suit, which was instituted for the specific performance of an agreement, the principal question was whether a proposal which

(1) 2 My. & K. 380, where Lord had taken place between the defendant's solicitor and a third person production of correspondence which after the dispute had arisen.—O. A. S.

1843.
May 11.
Lord
LYNDHURST,
L.C.
[484]

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had been made by the solicitor of the defendants to the solicitor of the plaintiffs, had been absolutely rejected at a certain meeting, held on the 26th of June, 1836, or whether it had been left open for further consideration. At the hearing the Court, upon the evidence, was of the former opinion, and dismissed the bill, with costs.

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By the Act of incorporation of the Railway Company it was enacted, that all resolutions come to by the proprietors should be entered in a book, and that such entries should be evidence in all Courts of law, of the resolutions to which they referred. The defendants having, by their answer, admitted the possession of this *book, the plaintiffs had obtained an order for its production, but liberty was given to the defendants to seal up, on the oath of their law clerk, such parts as did not relate to the matters in question. The book so sealed was accordingly produced, but in the parts which were left open there was no mention of, or reference to, the agreement. The bill having been dismissed with costs at the hearing, the plaintiffs had presented a petition of rehearing, and they now moved before the Lord Chancellor that the defendants might be ordered to produce the book unsealed at the hearing of the appeal, and that in the meantime the plaintiffs might be allowed to inspect it.

The motion was founded on an affidavit, stating that the plaintiffs had recently discovered that a resolution had been come to by the proprietors at a meeting held shortly after the proposal above mentioned had been made, in which the acceptance of that proposal was referred to and the transaction recognised as a complete agreement. The affidavit further stated that the page of the book in which the resolution would have been found, if it had been entered at all, was one of those which were sealed up.

No affidavit was filed in opposition to the motion.

Mr. Wakefield and *Mr. T. Parker*, in support of it, contended that in a case so pregnant with suspicion, if the defendants would not by affidavit deny that the book contained any entry of such resolution, they ought to be ordered to produce it unsealed.

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Mr. Bethell and *Mr. Bacon*, *contrà*, refused, on the part of their clients, to make any affidavit, insisting that *the application was without precedent: *Purcell v. Macnamara* (1) and *Bowes v. Fernie* (2).

(1) *Wigram on Discovery*, p. 240.

(2) 3 *My. & Cr.* 632.

Mr. Wakefield, in reply.

The LORD CHANCELLOR said he would help the plaintiffs if he could, but he did not see how, consistently with the practice, it was possible.

Motion refused, with costs.

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CANAL
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AND
ROTHERHAM
RAILWAY
COMPANY.

MURRAY v. VIPART.

(1 Phillips, 521—522; S. C. 14 L. J. Ch. 217; 9 Jur. 173.)

If the Court can be satisfied that a defendant who is out of the jurisdiction has given a special authority to a person within the jurisdiction to act for him in the suit, it will order that service of the *subpoena* to appear and answer on that person shall be good service on the defendant; but the evidence of agency will be closely scrutinized.

1845.
Jan. 16, 19.
Lord
LYNDHURST,
L.C.
[521]

THE defendant, who was residing at Boulogne in France, was an executrix; the plaintiffs were trustees of a sum of stock which was standing in the name of the testator. The bill was filed to obtain a transfer of the stock into the names of the plaintiffs. The plaintiffs put a *distringas* on the stock, and their solicitor applied by letter to the defendant to transfer it. To that letter he received no answer; but shortly afterwards, on the 2nd December, 1844, he received a letter from a Mr. Bennett, stating that the defendant had forwarded the letter of the plaintiffs' solicitor to him (Bennett), and had instructed him to do what was necessary in the matter on her behalf. Upon an affidavit of these facts, the plaintiffs applied to Vice-Chancellor Knight Bruce, for an order that service upon Mr. Bennett of the *subpoena* to appear and answer might be good service upon the defendant. His Honour, after hearing the case, desired that the application might be made to the Lord Chancellor.

Mr. Anderson now moved accordingly, and cited *Hobhouse v. Courtney* (1) [and other cases].

The LORD CHANCELLOR, after taking time to look into the authorities, said that he thought the principle laid down by the VICE-CHANCELLOR OF ENGLAND in *Hobhouse v. Courtney* was the right one, viz. that where the *defendant was abroad and had appointed an agent to act for him in the suit, service on that agent would be good service on the principal. That being the case, the only question here was, whether there was evidence enough to satisfy the Court

[*522]

(1) 56 R. R. 35 (12 Sim. 140).

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v.
VIPART.

that the defendant had made Bennett her agent for the purposes of this suit. It was obviously so easy to get up a case of this sort by collusion between the plaintiff and a third party, that great caution was necessary; but he thought that the affidavits in this case were satisfactory upon that point, and that the order might be made. His Lordship, however, desired, for the sake of greater caution, that another letter should forthwith be written to the defendant, apprising her of the application, in order that if there was any mistake, she might have an opportunity to intervene.

MORRALL v. SUTTON.

1844.
Jan. 18.
On Appeal.

1845.
Feb. 26.
—
Lord
LYNDHURST,
L.C.

PARKE, B.
COLERIDGE,
J.
[533]

1 Phillips, 533—557; S. C. 14 L. J. Ch. 266; 9 Jur. 637; on app. from 4 Beav. 478; 5 Beav. 100.)

Of two inconsistent dispositions in a will (both being intelligible), whether occurring in the same sentence or in different sentences, the last is to prevail, unless a contrary intention can be safely inferred from the context.

Discussion as to the amount of internal evidence which will justify such an inference.

THE will of Edward Lloyd, dated in 1789, was partly as follows: "I give and bequeath unto Ann Elizabeth Waring, Sarah Calcott the elder, and Mary Spencer, all my leasehold estate in Gloucestershire, held under the Dean and Chapter of Bristol, to hold to them for and during their joint natural lives, and the life of the longer liver of them, but subject nevertheless to, and charged and chargeable with, the following annuities; (that is to say,) one annuity of 20*l.* a-year to Esther Jerginson during her life, and one other annuity of 20*l.* a year to Sarah Jerginson, daughter of the said Esther Jerginson, during her life, and one other annuity of 10*l.* a year to Mrs. Addenbrooke, which several annuities I do hereby direct to be charged on my said estate in Gloucestershire, and to be paid half yearly, as the rents of the said estate can be received, without any deduction for taxes or otherwise. And from and after the decease of the said Ann Elizabeth Waring, Sarah Calcott, and Mary Spencer, I give, devise, and bequeath my said leasehold estate in Gloucestershire (subject to the said several annuities as aforesaid) to Sarah Calcott the younger, if she shall be then living, her executors, administrators, and assigns, subject to the said several annuities charged thereon, during the term of her natural life. And if the said Sarah Calcott the younger shall die in the lifetime of the said Ann Elizabeth Waring, Sarah Calcott the elder,

and Mary Spencer, leaving any lawful issue of her body that shall be living at the decease of the survivor of them, the said Ann Elizabeth Waring, Sarah Calcott the elder, and *Mary Spencer, then I give, devise, and bequeath the said leasehold premises, from and after the several deceases of the said Ann Elizabeth Waring, Sarah Calcott the elder, and Mary Spencer, to such child or children of the said Sarah Calcott the younger as shall be then living, to be equally divided between them, if more than one, share and share alike; provided that if any child of the said Sarah Calcott the younger shall be then dead, leaving issue then living, such issue shall be entitled to the same share as his, her, or their parent would have been if then living, equally between them, if more than one. But if the said Sarah Calcott the younger shall die in the lifetime of the said Ann Elizabeth Waring, Sarah Calcott, and Mary Spencer, or either of them, without leaving any lawful issue of her body that shall be living at the decease of the survivor of them the said Ann Elizabeth Waring, Sarah Calcott the elder, and Mary Spencer, then I give, devise, and bequeath all my said leasehold estate in Gloucestershire, after their several deceases, (but subject to the said annuities to Esther Jerginson, widow, and her daughter, Sarah Jerginson,) to Thomas Jerginson and Charles Morrall, their executors, administrators, and assigns, for all the then residue of the said leasehold interest therein, in equal shares and proportions."

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r.
SUTTON.
[*534]

"And it is my will, and I do hereby require, that the person or persons who shall be possessed of the said leasehold estate by virtue of this my will shall renew the said lease as often as occasion shall require, and not permit or suffer the same to be forfeited or become void; and that the expense of renewing the same shall be paid by and out of the rents and profits of the said premises at the time of renewal thereof, without prejudice to the said annuitants; and that the several persons *entitled to the rents of the said estate, except the said annuitants, shall pay a proportion of such expense, according to the amount of their respective estates and interests in the said premises: and if any or either of such persons interested (except as aforesaid) shall refuse to pay a proportionable share thereof as aforesaid, that the persons in possession of the said premises may detain and deduct the same out of the estate."

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The question in the cause was, whether Sarah Calcott the younger, who survived Elizabeth Waring, Sarah Calcott the elder, and Mary Spencer, took an absolute interest in the leaseholds, or

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v.
SUTTON.

only an estate for life, the defendant being entitled to the property in the former case, the plaintiff in the latter.

The case was twice argued before the MASTER OF THE ROLLS, who decided on both occasions in favour of the plaintiff. The defendant then appealed to the Lord Chancellor, and the appeal was heard in January, 1844, by his Lordship, assisted by Mr. Baron Parke and Mr. Justice Coleridge.

Mr. Kindersley, Mr. Wigram, and Mr. G. Russell appeared for the plaintiffs.

Mr. Tinney, Mr. Bethell, and Mr. Chandless, for the defendants.

1845.
Feb. 26.

The learned Judges, being of different opinions, now delivered their respective judgments.

PARKE, B. :

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My Lord Chancellor, I have fully considered the case which was argued before your Lordship in the presence of Mr. Justice Coleridge and myself some time ago, and I have now to submit the opinion *which I have formed upon it, and to assign the reasons for that opinion. I regret much that it is different from that of my learned brother.

The case lies in a very narrow compass, and depends upon the construction of one clause in the will of the testator, Edward Lloyd. By that clause the testator, after bequeathing three annuities together, and charging them on the testator's Gloucestershire estates, gives the estate to three persons, Ann Elizabeth Waring, Sarah Calcott the elder, and Mary Spencer, for their lives; and then the testator proceeds as follows: "From and after the decease of the said three persons, I give and bequeath my said leasehold estate in Gloucestershire (subject to the said several annuities as aforesaid) to Sarah Calcott the younger, if she shall be then living, her executors, administrators, and assigns (subject to the said annuities charged thereon)"—in a parenthesis—"during the term of her natural life." And the question is, whether under this clause Sarah Calcott the younger, who survived the three tenants for life, took the absolute interest, or only a life interest, in the leaseholds.

In ascertaining the intention of the testator, or, to speak more correctly, the meaning of the words used by him in this clause, we must apply the rules of construction, which have been very

wisely established for the purpose of attaining as great a degree of certainty in judicial decisions as the nature of the subject admits.

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These rules, so far as they are applicable to the present question, are admitted to be, that technical words are, *primâ facie*, to be understood in their strict technical sense; that the clause is, if possible, to receive a construction which will give to every expression *in it some effect, so that none may be rejected; that all the parts of the will are to be construed so as to form a consistent whole; that of two modes of construction, that is to be preferred which would prevent an intestacy; and that where two provisions of a will are totally irreconcilable, so that they cannot possibly stand together, and there is nothing in the context or general scope of the will which leads to a different conclusion, the last shall be considered as indicating a subsequent intention, and prevail. *Cum duo inter se pugnancia reperiuntur in testamento, ultimum ratum est*: Co. Litt. 112 b.

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It was argued indeed that this last-mentioned doctrine applied only to separate clauses: but it is not so, for it has been adopted where there are inconsistent expressions in the same clause, as in *Doe d. Leicester v. Biggs* (1), where the devise was to trustees "to pay unto, or else permit and suffer the testator's niece to receive the rents;" and it was held that the last words vested in her the legal estate.

In applying the above rules, the learned counsel on each side contend that the words on which they respectively rely are strictly technical; and so indeed they are, and are equally technical: but in their proper legal sense both are directly inconsistent with each other. Both counsel argue, however, that these expressions are only seemingly contradictory; and each contends that they may be best reconciled so as to establish the claim of their respective clients. The appellant argues that, assuming the absolute interest in the term to be given to Sarah Calcott by the words "to her executors, administrators, and assigns," the subsequent words "during *her natural life" may be explained to mean, that she should be subject to the annuities for her natural life, and so should be personally liable during life to them, though the lease might have determined.

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The respondent's counsel, on the other hand, insist that the gift of the estate to Sarah Calcott, her executors, administrators, and

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assigns, may be made consistent with a gift to her of a life estate only, by understanding the former words in some secondary and imperfect sense, as that the rents or fruits of the estate fallen during the life of the legatee should devolve on her executors, or that the executors should have a right after her death to repay themselves any advance she might have made for renewal of the leases, as provided for in a subsequent clause, or that the legal estate was given to her and her executors, and the beneficial estate only for life.

There are great difficulties in adopting any of these explanations. That proposed by the appellant, besides being a very strained construction, requires us to reject the marks of parenthesis which are clearly visible in the probate of the will, and which show that the testator means the sentence to be read, passing over the intermediate words, as if it had contained a gift to Sarah Calcott, her executors, administrators, and assigns, for her natural life. On the other hand, all the modes suggested on the part of the respondent have more or less of inconsistency, for all suppose a gift to executors and administrators of a person during life: that all of them make the words superfluous, is not a serious objection.

It is then contended for the appellant, that the context in the will affords such clear evidence of the testator's intention, as to enable us to decide between these contradictory provisions, and to call upon us to adopt the *construction which gives the legatee the absolute interest.

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The part of the context in the will on which reliance is placed for this purpose is that which immediately follows, by which the testator provides that if Sarah Calcott died in the lifetime of the three tenants for life, leaving lawful issue, her children should take the estates; and if without issue, it should go to Jerginson and Morrall. And this clause, it is said, shows an intention to provide for the issue of Sarah Calcott; and in the event which has happened that can only be done by construing the clause in question to give the absolute interest to Sarah Calcott, which would enable her to provide for her children by settlement or otherwise, and so give them an indirect benefit.

I admit that if I could find in the context any satisfactory evidence of an intention to provide for the issue of Sarah Calcott the younger, either generally or in the event that has happened, that would be a ground for rejecting the latter words, which give her an estate for life, and retaining the former, which give an

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absolute interest. As for instance, to put the clearest case, supposing the testator in his will had recited that it was his intention to provide for the issue of Sarah Calcott, or to enable her to provide for them in any event, that would have afforded a sufficient ground for deciding that the former words expressed the testator's real meaning, and the latter had been introduced *propter incuriam*: and of course, if the same conclusion could be fairly drawn from other parts of the will, which I have supposed to be distinctly expressed in a recital, the same result would follow. But I cannot find in the context any indication of an intention to provide for the issue generally, but only to provide for them in one event, *that is, the death of Sarah Calcott the younger during the lives of the three tenants for life. In that event he makes a provision for them expressly, and not by giving an estate to the mother to enable her to do so: and in that event also he gives an interest on the failure of issue to Jerginson and Morrall; but he gives none to them if Sarah Calcott survives the tenants for life and dies without issue. He certainly did not mean to give a contingent benefit in all events to Jerginson and Morrall, but has made it depend upon the event of Sarah Calcott dying before the tenants for life. How can we say that he had not the same intention as to the children? Again, if there had been a general intention to provide for the children by giving the mother the entire estate, why did he not give that estate to her, whether she survived the tenants for life or not? and why does he give an absolute estate to her if she survives, whether she has issue or not? It is perfectly clear that there is no uniform and consistent intention to provide for the issue in all events by the particular mode of giving an absolute estate to the mother.

It appears, therefore, to me to be a mere conjecture that the testator meant a benefit to the issue in the event which has happened. The words of the will in no part are such as to form a legitimate ground for judicial inference that he did. It is not indeed an unreasonable supposition that the testator might mean to enable the mother to provide for her issue if she survived by giving her the entire estate, and introduced the words "for life" by mistake, nor is it, on the other hand, unreasonable to suppose that he meant to give her a life estate only, and that he did not mean in that event to provide for the children at all; nor is it unreasonable to suppose that he meant to give Sarah Calcott a life estate, and that the words executors, &c. slipped into *the

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will, written by a professional man, in consequence of their usual connection with a gift of personal estate to another, and that the testator forgot to introduce a limitation over in favour of issue, and to Jerginson and Morrall afterwards. Here are three plausible conjectures. The last is really the most probable; all are consistent with the context: but all of the three suppositions appear to me to be conjecture merely.

I am aware that there are many cases in which Courts have gone considerable lengths in altering words in order to meet the supposed intention of testators, upon more or less satisfactory grounds; but I cannot help thinking that we shall better perform our duty, the more we bear in mind that it is the province of Judges to expound the words which are in the will, to ascertain the meaning of what the testator has actually written there, and not to speculate upon what he might reasonably be supposed to have intended to write, and to mould the language of the will accordingly. It seems to me, that, in attributing an intention to the testator to give Sarah Calcott an absolute interest in order to provide for her children, we are pursuing the latter course, and rather making a will for the testator than expounding any already made.

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I do not propose to go through the cases of alterations in the language of a will, which have been made to meet the presumed intention of the testator. In some which have been cited the last words have been rejected, the meaning of the testator being clear, and indeed apparent, in the sentence itself. In *Reece v. Steel* (1), where there was a devise "to C. H. for life, and to her heirs, the issue of her body, for ever, for their *lives," with a proviso containing a devise over if C. H. left no issue. It was clear that the testator intended to give C. H. an estate tail, and that each heir in tail should take for life; but that intention could not be carried into effect. *Doe d. Cotton v. Stenlake* (2) was another instance of the same kind: there was no difficulty in either case in ascertaining the testator's meaning, but in carrying it into effect. In *Smith v. Pybus* (3), where an annuity was left to A. for life, and after the decease of A. to be divided equally between B. and C. and D., "to them and their heirs, or the survivor of them in the order they are now mentioned," the Master of the Rolls, Sir W. GRANT, rejected the last words because they had no sense or meaning: and he said the question was, "whether words which had a plain meaning

(1) 29 R. R. 88 (2 Sim. 233).

(3) 9 Ves. 566.

(2) 11 R. R. 479 (12 East, 515).

were to be rejected for the sake of words of which you do not see the meaning." None of these cases are like the present. Here the words "for her natural life" cannot be explanatory of the mode in which the testator wishes S. Calcott herself and her personal representatives to take; and here also both the expressions are perfectly intelligible, but in their proper sense perfectly inconsistent.

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In *Boon v. Cornforth* (1), Lord HARDWICKE rejected interlined words which were presumably the last written, because they were inconsistent, and repugnant to the whole disposition: and his Lordship thought he had no alternative but that of rejecting those words, or the entire provision. Here there is no such necessity: it is a simple alternative of the rejection of the first or last words, each having a perfectly sensible meaning.

In many other cases the Courts have altered the language of the will to suit the testator's intention, which they have seen in the whole purview of the will, or in the particular sentence. I do not enter into the consideration of these, the principle being admitted. One class of cases is very clearly established: Where there is a devise in fee, with a limitation over if the devisee die under twenty-one, "or" without issue, the word "or" is construed "and:" the ground is, that the testator, by making the event of having issue a condition of preserving the estate, evidently intends an indirect benefit to such issue by the very devise itself of an estate in fee. The cases are all collected in Mr. Jarman's edition of Powell, vol. i. 380, note. But in this case I see no proof of intent to benefit the issue by giving the estate to the mother, either in the clause itself or the context: it amounts to a mere conjecture, which may or may not turn out to be true. Nor is the argument derived from the supposed intestacy of the testator as to the remainder, if a life interest only is given, of any avail. There is no intestacy upon this construction, for there is a disposition of the remainder in the residuary clause: and it is no answer to say that this disposition confers a very remote benefit on the issue, for there is no proof of an intention to benefit them in all events.

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I think, therefore, that the context throws no light on the clause in question, and most certainly that clause is consistent with it. I must therefore decide upon the meaning of the words by the clause itself, acting upon the established rules of construction; and so doing, I think, either that the apparent repugnance may be

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best explained by understanding the gift to the executors in some secondary and improper sense, for the purpose of giving the executors after death a fruit fallen during life, or (and to the latter course I strongly incline) that *the two provisions are absolutely repugnant, and cannot be reconciled at all ; and being unexplained by the context, then, according to the rule above referred to, the last provision must prevail.

I therefore conclude that Sarah Calcott took an estate for life only in the Gloucestershire leasehold estate.

COLERIDGE, J. :

My Lord Chancellor, Having the misfortune to differ in opinion with the MASTER OF THE ROLLS and my brother PARKE in this case, I cannot state to your Lordship the conclusion to which I have arrived without the greatest distrust of its correctness, as well from that circumstance as from the acknowledged difficulty of the question, and a just diffidence of my own judgment upon any such occasion. It is satisfactory to me to find that on the principles of decision there is no substantial difference between my brother and myself.

The question at issue turns upon the effect to be given to the following clause in the will of Edward Lloyd : “ I give, devise, and bequeath my said leasehold estates in Gloucestershire (subject to the said several annuities as aforesaid) to Sarah Calcott the younger, if she shall be then living, her executors, administrators, and assigns (subject to the said annuities charged thereon), during the term of her natural life.” Having had the advantage of hearing my learned brother's judgment, I may say at once that I entirely concur with him in the opinion to which he strongly inclines, that no satisfactory interpretation was suggested at the Bar, and that none, probably, can be, by which to reconcile the two parts of this sentence—that, in the first place, by which the estate is given to Sarah Calcott, her executors, administrators, and assigns, and that, in the second *place, by which it is limited to her during her natural life. Upon this part of the case, therefore, I will add nothing.

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But if these two parts of the sentence cannot be reconciled, it follows that, if any effect be given to the clause, it must be by rejecting one of them. It must be assumed that one of them the testator wrote, or, having written, permitted to stand, unadvisedly ; that one of them, in short, does not express his last will. The

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question then is, which of the two is to be rejected, which is to stand; and it will be very important in the solution of this to remember that it is not an inquiry into the meaning of what the testator has written, but practically to ascertain what it is which he is to be taken deliberately to have written, as his last will,—not a question of construction (for every word in itself is perfectly unambiguous), but an inquiry what is the subject-matter to be construed. I make this remark in the commencement, because it serves to show that many of the ordinary rules of construction have directly no bearing on this inquiry, and because it may warrant a wider discretion in the Court than it would properly assume on a mere question of interpretation.

To assist the Court in such an inquiry, a general rule has been established, after some controversy. The latter clause or phrase is to be preferred, the former rejected. And if this rule were universal and unqualified in its application, nothing could be more easy, of course, than to act on it: the fact being established—and it would be of simple ascertainment—that the clauses or sentences were repugnant to each other, the decision would be easy, and in all cases uniform. But I think it may be taken as clearly established, that this rule must not be acted on so as to clash with another paramount *rule, which is, that before all things we must look for the intention of the testator as we find it expressed or clearly implied in the general tenor of the will; and when we have found that on evidence satisfactory in kind and degree, to that we must sacrifice the inconsistent clause or words, whether standing first or last, indifferently: and this rests upon good reason; for although, when there are repugnant dispositions, and nothing leads clearly to a preference of one or rejection of the other, convenience is strongly in favour of some rule, however arbitrary, yet the foundation of this rule, as of every other established for the interpretation of wills, obviously is, that it was supposed to be the safest guide under the circumstances to the last intention of the testator. To consider it merely arbitrary would be unnecessarily to suppose an anomaly in the canons by which wills are interpreted: to make it a rule of evidence is to make it harmonise in principle with them. The first efficient disposition by deed prevails, because it exhausts the power of the grantor; but a testament being ambulatory till the death of the testator, the last expression of his mind must prevail: and if two intentions are expressed in the same testament inconsistent with each other, the former must

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be presumed to have been abandoned, and must be over-ruled by the latter. But where, in the same instrument, either from recitals over-riding the whole, or from express provisions, it can be collected with reasonable certainty that there was no departure from the original intention, the presumption is rebutted, and the latter clause, as repugnant to a still subsisting intention, must be rejected.

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That the conflicting words occur in the same sentence, I admit, has been held to be not a sufficient reason in itself for refusing to apply the rule, and properly. In a case where there is nothing to lead the mind to an *opposite conclusion, not merely the convenience of a certain rule, but reason, requires that it should be so; for there is evidence, slight indeed, of a change of intention, and nothing to set against it. *Doe v. Biggs* (1) is an authority for this. And on the other hand, where words have been inserted in a sentence by interlineation, and therefore may be presumed to have been last written, these have been rejected, if they were clearly repugnant to the intention of the testator in the whole provision for disposing of that part of his property. *Boon v. Cornforth* (2) is an instance of this. But although I distinctly admit that, in cases where the rule is properly to be applied at all, it will apply to inconsistent clauses in the same sentence as well as to inconsistent sentences in the same will, yet, where the question is, whether it is to be applied, we shall be led more easily, and on slighter evidence, to determine in the negative in the former case than in the latter, simply because the principle on which the rule stands exists in less strength in the former than in the latter case. To suppose a variation of intention between the penning of the former and the latter part of the same sentence is less reasonable than between the framing of different dispositions in the same will. The amount of the difference may vary infinitely. I am not upon the degree, but the principle.

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Mr. Jarman, in his excellent work on Wills, ch. xv., expresses the rule in language which I would wish to adopt, and I cite him the rather because, in the opening of the same chapter, he seems to me to have expressed himself in language which needs qualification. "It is clear," he says, "that words and passages in a will which are irreconcilable with the general context may be rejected, *whatever may be the local position which they happen to occupy; for the rule, which gives effect to the posterior of several inconsistent clauses, must not be so applied as in any degree to clash or

(1) 11 R. R. 533 (2 Taunt. 109).

(2) 2 Ves. Sen. 577.

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interfere with the doctrine which teaches us to look for the intention of a testator in the general tenor of the instrument, and to sacrifice to the scheme of disposition so disclosed any incongruous words and phrases which have found a place therein." (Vol. i. p. 420) (1). I believe that up to this point there is no material difference of opinion between my learned brother and myself (not, of course, that I presume upon his acquiescence in every argument or illustration which I have used); still, with a view to what follows, I have thought it necessary to state this preliminary matter thus fully.

Whether, then, the rule is to be applied or not, must in every case depend on the evidence of intention supplied by the will itself; and the practical difference between us is as to the amount of evidence which should be sufficient to take a case out of the rule. The question here being whether Sarah Calcott took an estate absolute or only for life, it is conceded, I believe, that if an intention can be clearly collected from the context, either to provide for her children generally or in some specified event—the event which has happened—we ought to retain the words, however placed, by which alone that intention can be effectuated, and reject those which will absolutely defeat it. But it is assumed, that, from clear provisions for the children in certain events, no inference can be drawn of an intent to provide for them generally, or in the event which has happened, and therefore that such provisions will have no effect in preventing the application of the rule. This, I own, seems to me to narrow the ground in a way for which I find no authority, and in itself unreasonable. *Suppose the testator had anxiously provided for the children in three, four, or more possible contingencies, I should have thought that a ground from which an inference might have been drawn of an intention to provide for them in a fifth which had arisen, but had not been specified in the will; a ground strong enough at least to determine my election between two inconsistent clauses, one of which was so worded as to carry that intention into effect, the other to defeat it, though I should not have felt warranted from it in supplying such a clause if not found in the will. For it must never be lost sight of, that this is not a case of introducing words into a will to carry into effect a presumed intention. You have all the words required for your purpose, clear and unambiguous. The question is only, whether they are to be retained or rejected by reason of repugnant words following. That question, it is agreed, must be determined by the context. If from

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the context you can gather nothing as to the testator's intention, I admit the technical rule must prevail. But on what principle is it required, on the other hand, that conclusive evidence of intention, expressly embracing every contingency, should be adduced, before the rule can be rejected? If, indeed, the question were whether a particular devise or bequest, not expressed, should be supplied from evidence of intention, I could understand the argument that such an inference could not be drawn merely from the intent to give some interest under other circumstances than those which had actually arisen. But this is not that case. Further, I agree, that even in a case like the present, where it is not a question of supplying but rejecting words, that which amounts to no more than a mere guess ought not judicially to influence the mind at all; it should be considered as nothing; but that a canon so strict as that referred to cannot be the true one, may, I think, *appear from this consideration alone: if the latter words be rejected, the first must stand. Suppose then evidence of intention to be gathered from the context, inconsistent with the latter, and yet not pointing specifically to the former at all, still, on this evidence, the former must surely be supported, simply because the latter must be rejected. Suppose, for example, the question to be between words giving an estate tail and an estate for life, and the context only to show clearly that there was no intention to devise for life only, but to contain nothing from which that particular estate of inheritance, the estate in tail, could have been inferred, still you would remove the words giving the estate for life, and by so doing those which gave the estate in tail would be established. I apprehend, then, that as the rule itself is a rule of evidence, so the considerations which determine on its application or rejection must be cogent, but need not be conclusive; and that it is enough to show the general tenor and context to be inconsistent with the latter words without also showing that they point precisely to the provisions in the former, if they are not at variance with them.

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From the nature of the thing it is impossible to define with strict mathematical accuracy the degree of cogency in the evidence which will warrant the Court in rejecting the technical rule; but for practical purposes we may come near enough by authorities in the cases most closely analogous: and I should say that the Court would be warranted most clearly and *à fortiori*, wherever the evidence is such as would warrant it in transposing clauses, altering words, or supplying devises unexpressed. I specify these because they go

beyond mere construction; they either alter or add to the written will upon the ground of a clearly manifested, though ill or imperfectly expressed, intent. It *would be easy to multiply citations of cases under each of these heads; but I have already trespassed so long on your Lordship's patience, that I will cite but two to illustrate the principle to be collected from them, which I conceive to be this: that, in order to do these strong acts, Courts have not thought themselves bound to require evidence of necessary, inevitable cogency, but only that which made the intention highly probable, which showed the will as it stood to be very unreasonable, and the alteration or addition necessary to make it, in legal reasoning, reasonable and consistent. An intention in the testator to be consistent with himself is always assumed as a cardinal point in construction. Thus, in *Soule v. Gerrard* (1), the devise was "to my son R. and his heirs for ever, and if R. dies within the age of twenty-one years, or without issue, then over." R. had issue Mary, and died within age. It was resolved that "or" should be construed "and," and that Mary should take. Here there was nothing impossible in the testator's making the inheritance to depend on two several contingencies: it might be his caprice that the estate should go over if either of two possible events should happen, both of which were clearly present to his mind, and he had expressed himself quite unambiguously to that effect. But the Court looked to the consequences: they would not suppose in the testator a caprice so inconsistent with the general intent apparent to give R. an estate of inheritance if he left issue of his body to take it, and therefore they read the will as if the testator had united the contingencies. It is well known that this has become a settled rule, and numberless wills have been construed in accordance with it. *White v. Barber* (2) is a case perhaps more analogous to the present. There the testator, having one son T. P. living *at the time of making his will, devised to his wife until T. P. attained twenty-one, and then to him in fee. But if his wife should be *enceinte* with one or more children at the time of his decease, and T. P. should die without issue before twenty-one, such child or children then living, then he devised to his wife until they attained twenty-one, and then to such children in fee; but if T. P. should die without issue, and before twenty-one, or that such posthumous children, if any, should die without issue, and before twenty-one, then to his wife for life, remainder over to his nephews in fee.

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(1) Cro. Eliz. 525.

(2) 5 Burr. 2703; Ambler, 701.

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Here was a most careful provision for the living child, and for any posthumous issue; but the case of children born in his lifetime, after the will made, was wholly overlooked. Two such were born, and more than five years after the date of the will the testator died, not leaving his wife *enceinte*; and then T. P. died a minor, and without issue: upon a case out of Chancery the Court of Queen's Bench certified that the two younger children would take under the will an estate in fee at their respective ages of twenty-one. Here it might have been said, what evidence of any intention to provide for afterborn, because there was an intention to provide for living and posthumous, children? It is a distinct class: still less what evidence of an intent to give the second and third child a joint estate in fee when the eldest was to take alone, and the posthumous, if more than one, must have been twins, which might explain why they were to take jointly? There certainly was no conclusive evidence, but the Court thought that a father who took such anxious care for posthumous children as to make an express provision for them could never intend to give them his estate in exclusion of, or to his nephews in preference to, any child or children that might be born in his lifetime. They therefore, not only supplied a devise, but framed it in a special manner to meet the

[*553] *supposed intent, which they gathered from the will upon moral evidence, highly probable, but falling very far short of demonstration.

To apply now these principles and authorities to the present case, and see what the evidence is against the intention to limit Sarah Calcott's estate to her for life. In the first place, that involves in a certain event an intestacy, at least the contemplation of it in the testator's mind, as to this a considerable and much considered part of his property. For although the words of the residuary clause may be large enough to include it, yet no one who reads that clause, and considers the trusts there limited, will believe that the testator ever contemplated the possibility of this property falling under it. Now beyond the general presumption against an intention of intestacy, the anxiously minute details of the whole will seem to me to exclude the notion of this case absolutely; and with regard to this particular property, the testator seems to have separated it from the rest, to have provided for the transmission of it under every contingency; and instead of intending that it might come to sale under the residuary clause, he is evidently anxious that the lease should be constantly renewed, and has provided accordingly.

Next, it is clear that Sarah Calcott the younger and her issue, if

she should have any, were near objects of his bounty, and that substantially and specifically he meant to provide for them by these leaseholds; accordingly, after the death of three persons (one of them her mother) she is to take; but she might die before them and leave issue: in that case, and if such issue survive the tenants for life, they are to take absolutely; and if any child should die before the tenants for life, leaving *issue who should survive them, such issue is to take the parent's share absolutely. Here, then, if the mother never takes at all, is the most abundant care that her issue, if any, shall take the entire interest.

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Next, the ultimate remaindermen are, expressly, only to take in case Sarah Calcott should die before the tenants for life, leaving no issue; so that if she had lived and taken the property, and then died leaving issue, the judgment of the MASTER OF THE ROLLS would have defeated not only such issue, but the ultimate remainders over: so far is clear. But if she survives and comes to the property, what estate will she take? There are two sets of words descriptive of her estate: according to the former she will take absolutely; according to the latter only for life; one set must be rejected. If you reject the former, upon her death her children are left unprovided, and the remainders over are also defeated; and there is virtually an intestacy as to the property in question: and although both the children and the remaindermen must have been present to the testator's mind, and the same provisions were necessary to secure their interests, and prevent intestacy, whether she died before or after taking the property, they are wholly omitted in the latter case, though so carefully made in the former. On the other hand, if you reject the latter words, it is true that no specific provisions are made for the children, but they become unnecessary, because their interests might well be left to the care and under the control of the parent. This is so common a mode of providing for children as a class, that the absence of an independent limitation to their use weighs almost nothing. And as to the remaindermen, by the supposition there would then be no need to provide for them.

Let us now apply the reasoning which governed the Court in *White v. Barber* to these facts. Could the testator intend that these children should take all if the mother did not live to come to the property, but nothing if she did? Would he carefully provide to secure the property from the residuary clause, in favour of the children and remaindermen, if she did not come to it; and although there might be the same children and same remaindermen, was it

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to be thrown into the residue if she did? Whether she never came to the property and died issueless, or came to it as tenant for life and died with issue, would be the same thing, as to the necessity for an ulterior disposition of the property. Why should a remainder be provided in the one case and not in the other?

The respondents would find it difficult to answer these questions satisfactorily; and if so, it seems to me (and I say it with diffidence), no argument, to assert that you cannot infer an intention to provide for the children in one event, from an expressed intention to provide for them in another, or to provide for them in every event, from an intention to provide for them in one; I agree that from these premises simply you cannot infer those conclusions. But this seems to me not the correct way of stating the question. Two sets of words are used; one must be rejected: take the one, and the will is reasonable and consistent; in the doubtful parts it becomes what from the undoubted you could have expected to find it: take the other, and it is exactly the reverse: Why then reject the former? simply because it was first written, and the testator must be taken to have changed his intention before he wrote the latter. The reply is, that these particulars above relied on rebut the presumption of any such change, and, further, as these particulars *are themselves set down after the words which give the estate for life, no change of intention can be supposed inconsistent with them, for this turns the argument for the rule from mere position against it.

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For these reasons, with all the diffidence which I expressed in the commencement, I humbly state my opinion that Sarah Calcott, under the bequest in question, took an absolute interest in the leasehold estates; and I deeply regret, that by this difference in opinion from my brother PARKE, I may to the extent, however limited, to which my reasons may seem deserving of attention, have increased rather than diminished the difficulty of the decision; but your Lordship and the parties have a right to the expression of the best opinion which I can form.

The LORD CHANCELLOR, after thanking his learned brothers for their assistance, said, that in consequence of their difference of opinion, it became necessary for him to consider what course ought to be adopted, with a view, if possible, to save the parties the expense of an appeal to the House of Lords. He considered the present state of things analogous to that in which, upon a case stated for the opinion of a court of law, the Court was equally divided, and no

certificate therefore returned, in which case it would be a matter of course to refer the question to another court of law. The only reason, he understood, why the MASTER OF THE ROLLS had not adopted that course in the first instance, was because he found it impossible to send a case in such a form as not to prejudice some of the arguments on one side or the other. Under those circumstances, he proposed acting upon the analogy to which he had referred, to request the assistance of the Chief Justice of the Common Pleas and the Chief Baron of the Exchequer, *and to have the case re-argued in their presence.

MORRALL
v.
SUTTON.

[*557]

The reporter has been informed that the suit has since been compromised.

OLDFIELD v. COBBETT.

(1 Phillips, 557—559; S. C. 15 L. J. Ch. 116; 10 Jur. 2.)

Where a defendant, who is in custody under process of contempt, for want of an answer, puts in his answer, the plaintiff, by replying to the answer, waives the contempt, and entitles the defendant to his discharge, without payment of costs.

1845.
Feb. 14.
—
Lord
LYNDHURST,
L.C.
[557]

THE defendant, being in contempt for want of an answer, was taken, under a Commission of Rebellion, and lodged in Whitecross Prison, from whence he was brought up by *habeas* to the Bar of the Court of Exchequer and turned over to the Fleet; after which several other detainers were lodged against him. He subsequently put in his answer, but did not pay the costs of his contempt. Some months afterwards the plaintiff replied to the answer, and served the defendant with a *subpœna* to rejoin.

The defendant now moved, in person, before the Lord Chancellor, that he might be discharged from custody under the order of commitment, on the ground, amongst others, that the plaintiff had, by replying to the answer, waived the contempt: *Haynes v. Ball* (1).

Mr. Wakefield, *contrà*, drew a distinction between the case of a defendant being merely in contempt for want of an answer, and that of a defendant actually in custody for such contempt. [He cited *Anonymous* (2) and other cases.]

THE LORD CHANCELLOR:

[558]

None of the cases cited by *Mr. Wakefield* establish the distinction for which he has contended: for they only show affirmatively that

(1) 5 Beav. 140.

(2) 15 Ves. 174 [see the LORD

CHANCELLOR's observation on this case, next page].

OLDFIELD
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the acceptance of an answer is a waiver of the right to recover the costs under the process of contempt; but they do not show negatively that it is not such a waiver of the contempt altogether as to entitle the defendant to his discharge where he is in actual custody. The *Anonymous* case in Vesey certainly has a tendency to that conclusion; but it is too vague to be relied on. On the other hand, *Haynes v. Ball* (1) is an express authority the other way. And *Mr. Wakefield* had nothing to say to that case, except that it was not law. But there is another case of *Smith v. Campbell* (2), in which the point arose. That indeed was an *ex parte* application: but from the nature of the application the attention of the Court was particularly drawn to the point, and it occurred to no one to take the distinction now insisted on by *Mr. Wakefield*. Out of respect, however, for that learned gentleman's opinion, I have referred to the Clerks of Records and Writs as to the practice, and they have returned me this certificate:

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"That where a defendant is in contempt for want of answer (whether in custody or otherwise), and he afterwards *files his answer, to which the plaintiff replies, such defendant is thereby entitled to be discharged from his contempt without payment of the costs thereof."

I think, on the express decisions to which I have referred, and this certificate, I must consider that what has taken place amounts to a waiver of the contempt, and that with respect to this order of commitment the defendant is entitled to be discharged without payment of costs. The defendant has on former occasions moved to discharge that order for irregularity, and those motions have been refused with costs. What I now do will not affect those orders

1845.
April 14.
—
Lord
LYNDHURST,
L.C.
[564]

IN THE MATTER OF THE KING'S GRAMMAR SCHOOL, WARWICK.

(1 Phillips, 564—568; S. C. 14 L. J. Ch. 338.)

In settling a scheme for a grammar school, where the head-master is to be a graduate of Oxford or Cambridge, and in holy orders, the Court will give no specific directions as to religious instruction or discipline, but will leave the details of both to the discretion of the head-master.

Restrictions imposed on the master of a free grammar school as to holding ecclesiastical preferment.

THE school in question was a free school, which was founded and endowed by a charter of King Henry VIII., in the thirty-seventh

(1) 5 Beav. 140.

(2) 1 Russ. & My. 323.

year of his reign, "to the end, that the young subjects of his kingdom in the county of Warwick, might thereafter be instructed in useful and ornamental learning." Several additions were subsequently made to the endowment from private benefactions. In the year 1838, the school having become inefficient in consequence of the limited course of instruction carried on in it, and other causes, it was referred to the Master to approve of a scheme for its future conduct and management, with liberty to approve of a plan for adding instruction in commercial and general education to instruction in grammar and other learning fit to be taught in a grammar school.

The Master having made his report, this petition was presented by the trustees of the municipal charities of the borough of Warwick, praying, amongst other things, that the scheme which the Master had approved might be confirmed, with certain alterations.

The petition now came on to be heard, all parties consenting that the questions arising upon the scheme should be decided by the Court in this form, instead of upon exceptions to the report.

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* * * * *

By the seventh clause it was provided, that during one hour at least of every school day, the head-master or under-master should give religious instruction, to be confined to the reading and explaining of the Scriptures; and on every Lord's only, the said head-master or under-master should give instruction in the Liturgy, Catechism, and Articles of the Church of England, to such of the boys whose parents were in communion with that Church, and to such of the boys whose parents or persons standing to them *in loco parentis* did not object to their receiving such instruction. And the eighth clause provided, that the head-master should see that all the dayscholars regularly attended Divine service according to the rules of the Church of England, once or oftener on Sundays and Good Friday, and that they should assemble together at the school, and proceed, under the care and superintendence of the head-master or of the under-master, to the parish church, or some other church or chapel where the service of the Church of England was performed.

[566]

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With respect to these clauses,

Mr. Rolt [for the petitioners objected to these clauses].

Mr. Wray, for the *Attorney-General*, insisted on both the

In re
THE KING'S
GRAMMAR
SCHOOL,
WARWICK.

clauses being retained, stating that all the old schemes contained similar provisions.

THE LORD CHANCELLOR:

[*568]

I think it is better to omit both clauses, not on the ground that religious instruction is not to be required (for I assume as a matter of course that it will be given), *but because, when I find that the head-master is to be a graduate of one of the Universities and in holy orders, and the under-master to be appointed by him, it seems to me better to leave every thing relating to religious instruction to his discretion: I think it much better for the establishment, and much better for religion, to do so than to give any specific direction with respect to it.

Mr. Hetherington appeared for the head-master.

Mr. Bayley, for the Corporation of Warwick.

BRUIN v. KNOTT (1).

(1 Phillips, 572—576; S. C. 14 L. J. Ch. 440; 9 Jur. 979.)

1845.
June 26.

SHADWELL,
V.-C.

On Appeal.
July 2.

Lord
LYNDHURST,
L.C.

[572]

The allowance to which a mother who has maintained her orphan child is entitled, after the death of the child, out of the accumulations of its fortune, is limited to what she has actually expended upon maintenance, though the expenditure should have been less than the amount of the child's fortune would have justified; and the allowance ought to be paid out of that part of the child's fortune which it would have been most for the benefit of the child, if living, to have applied for that purpose.

IN October, 1823, Joseph Aldridge, a citizen of London, died intestate, leaving a widow and three children. By the custom of London, one third of the residuary personal estate of the intestate, which was of large amount, belonged to his widow as such, another third to her as administratrix, and the other third to the children, in equal shares, with benefit of survivorship among them in the event of any dying under twenty-one. Two of the children died successively under twenty-one, Joseph, the child who died second, having attained eighteen, and made a will, by which he bequeathed all his property to his mother. On his death, this bill was filed by Sarah Bruin, the surviving child, and her husband, against the intestate's widow, who had married again, and her second husband, praying, amongst other things, that the plaintiff, Sarah Bruin,

(1) *Brown v. Smith* (1878) 10 Ch. D. 377.

might be entitled to the shares, as well original as by survivorship, of the child who died last, together with the accumulations on such shares respectively. The defendants by their answer stated that Joseph *had been maintained and educated by his mother from his father's death until his own death, and they claimed to be reimbursed the amount of the expenses of such maintenance and education out of the fund in dispute, in case the Court should be of opinion that they were not entitled to the whole.

BRUIN
 &
 KNOTT.

[*573]

It appeared that Joseph, the child who died last, was entitled absolutely to other property, both real and personal, to a considerable amount.

Upon the hearing of the cause before the Vice-Chancellor of England, two questions were referred to the Court of the Mayor and Aldermen; first, whether the share, which an orphan may have taken by survivorship, itself survives on his death under twenty-one, as well as his original share; and, secondly, whether, if there be an accumulation of interest on an orphanage share, the accumulation survives in the same manner. That Court having answered both questions in the affirmative, the cause came on again upon the equity reserved; when the VICE-CHANCELLOR, after making a declaration in conformity with the prayer of the bill, referred it to the Master, to enquire and state what sum would be proper to be allowed for the maintenance of Joseph Aldridge from the death of his father to his own death, having regard to the whole of his fortune, with liberty to the Master to state special circumstances. From that part of the VICE-CHANCELLOR's order the plaintiffs appealed.

Mr. Tinney and Mr. Parry appeared for the appellants.

Mr. Stuart and Mr. Collins for the respondents. * * *

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THE LORD CHANCELLOR :

The Vice-Chancellor seems to have proceeded upon the same principle as if this had been a question of prospective maintenance: I do not think, however, that that is the right principle, with reference to past maintenance. *I see no reason why a party who has maintained a child without the order of the Court should be allowed more than she has actually expended. In lunacy the case occurs every day, and the enquiry always is, what sum has been properly expended. It does not follow, however, that the mother is to be

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KNOTT.

put to the proof, by voucher, of every item that she has expended on account of her child, who has lived with her. That would be most unreasonable. The enquiry should be, what was the scale of expenditure on which the child was maintained, and what would be proper to be allowed in respect of it, having regard to the amount of the child's fortune. If the mother has maintained her child on a scale corresponding with his fortune, she will be allowed it; if she has not gone so far, she will be allowed only what she has actually expended. The principle is, that the mother is entitled to a complete indemnity for the money actually expended on her child's maintenance within proper limits, but nothing more.

The only other question is, out of what fund the allowance ought to come; and upon that point I am of opinion that, supposing the scale of expenditure not to have exceeded what was warranted by the orphanage share alone, it ought to be defrayed out of that fund. The child had a right to be maintained out of it; and it was clearly for his benefit that he should be maintained out of the income of that fund, in which he had a defeasible interest, rather than out of other property to which he was absolutely entitled. I understand the income of the orphanage share was 800*l.* a year; and from what I have heard in the course of this discussion, I am satisfied that the scale of his maintenance has not been more than was warranted by an income of that amount. I will not, therefore, put the parties to the *expense of an enquiry such as *Mr. Tinney* asks, for I am satisfied it would be useless. If I should be mistaken on that point, it will come out by giving the Master liberty to state special circumstances.

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The order directed a reference to the Master to inquire and state what sum would be proper to be allowed to Ann Knott for the maintenance of the infant Joseph Aldridge, deceased, from the death of his father to his own death, regard being had to the manner in which he was maintained from time to time, with liberty to state special circumstances relating thereto at the request of either party.

BARRS *v.* JACKSON (1).

(1 Phillips, 582—589; S. C. 14 L. J. Ch. 433; 9 Jur. 609; revg. 1 Y. & C. C. C. 585.)

If the sentence of an Ecclesiastical Court in a suit for administration turns upon the question of which of the parties is next of kin to the intestate, such sentence is conclusive upon that question in a subsequent suit in this Court between the same parties for distribution.

THIS was an appeal from a decree of Vice-Chancellor KNIGHT BRUCE [reported in 1 Y. & C. C. C. 585 (2)].

The material facts of the case are shortly stated in the LORD CHANCELLOR'S judgment [and the material authorities cited in the argument will be found referred to in the judgment].

Mr. Simpkinson and *Mr. Heathfield* for the plaintiffs (the respondents).

Mr. Purvis and *Mr. Hubback* for the defendants (the appellants).

THE LORD CHANCELLOR :

In this case Harriet Martindale Smith died unmarried and intestate, and a suit was instituted in the Prerogative Court for administration to her estate. Jackson, the defendant in this suit, claiming as second cousin to Harriet Martindale Smith, and as her next of kin: Mrs. Barrs claiming as her niece, and next of kin. The Court decided in favour of the claim of Jackson, and the sentence was, that administration should be granted to him as next of kin. A suit was afterwards instituted in this Court—the suit now before me—by Mrs. Barrs, claiming, as niece and next of kin, the residuary estate of the intestate.

The defendant, in his answer, insisted on the sentence of the Ecclesiastical Court, by which administration was *awarded to him. He stated that the question now in issue was the sole question in the Ecclesiastical Court, and that it was there decided in his favour. The question is whether, this point having been decided between the same parties, that decision is conclusive. The VICE-CHANCELLOR did not consider it conclusive, but directed an issue; and from that order this appeal is brought.

(1) *Caird v. Moss* (1886) 33 Ch. D. 22, 55 L. J. Ch. 854, 55 L. T. 453.

(2) Notwithstanding this reversal of the VICE-CHANCELLOR'S decree, there are some general observations in his judgment upon the effect of the defence

of *res judicata* which are occasionally cited from the report below, and these observations are accordingly retained in their proper place in that report. See 57 R. R. 461.—O. A. S.

1843.
Dec. 15.

KNIGHT
BRUCE, V.-C.

On Appeal.

1845.
July 10.

Lord
LYNDHURST,
L.C.

[582]

July 10.

[*583]

BARRS
v.
JACKSON.

It was stated at the Bar and before the Vice-Chancellor, that this point had been decided by the House of Lords in 1776, in the case of *Bouchier v. Taylor* (1). If that be so, if the point was raised in that case, and was actually decided, I cannot enter into any general reasoning upon it, but I am bound by that decision. Therefore it is necessary to consider the case of *Bouchier v. Taylor*. Dr. Bouchier claimed to be next of kin to Anne Millington. He claimed as her first cousin once removed. Alice Merchant claimed as her first cousin. A suit was instituted for administration in the Prerogative Court, and the decision was in favour of Dr. Bouchier. That decision turned solely on the question, which of the two claimants was next of kin. Afterwards a suit was instituted in this Court by a person claiming under the will of Alice, as her residuary legatee; the defendant insisted on his title as next of kin, and the question was, whether the decision of the Ecclesiastical Court was conclusive and binding on the parties. The suit, there, was not actually between the same parties, but between one of the same parties and a person claiming under the other, so that in effect it was between the same parties. It came on before the Lord Keeper Henley, and the sentence being insisted on as a plea in bar to the suit, it was ordered that the plea should stand for an answer, with liberty to except. Exceptions *were accordingly taken. On the argument of those exceptions there were two points in controversy; first, whether the sentence was conclusive; and, secondly, if it was not, what was the effect of certain special circumstances, which were also insisted on. The LORD KEEPER directed an issue, and Lord Chancellor BATHURST on appeal affirmed that decision, only varying the form of the issue. An appeal was then carried to the House of Lords, while Lord BATHURST himself sat there as Chancellor. Lord MANSFIELD was present; the case was elaborately argued, and the result was, that the House of Lords reversed the decision of the LORD CHANCELLOR, in his presence. If, therefore, in that case this point was raised and decided, that decision concludes the question as far as this Court is concerned. It was said, however, that nothing appeared in the order of the House of Lords to show on what ground it proceeded: it was a mere judgment of reversal. It is only by looking at what falls from the Lords in moving the judgment, that you collect what are the precise grounds of the decision. Now at that time there were no reports of proceedings in the House of Lords. Mr. Brown collected and abstracted

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BARRS
C.
JACKSON.

the appeal cases decided there, and his report is nothing more than an abstract: Therefore, if it rested on Mr. Brown's report, it would be difficult to say on what ground the judgment in question proceeded; but we happen, from another source, to have a very distinct account of what passed, from which it appears that the House of Lords decided the case on both grounds. For that we need no better authority than the evidence of Mr. Hargrave. He was counsel in the cause: he drew the case for the appellant, and he was present at the argument and judgment. In his Law Tracts (p. 473), after stating that two points were made,—one being, whether the sentence of the Ecclesiastical Court was not conclusive; the other, whether *the special circumstances of the case did not make an issue improper—he goes on to say, that, “on the hearing the decree was reversed on both grounds, without the least opposition by the LORD CHANCELLOR, or any other Lord: and Lord MANSFIELD, who was the only speaker on the subject, in his reasons against the decree, was clear that the sentence was conclusive, notwithstanding the difference in point of objects between the two suits; and that the Court of Chancery, in exercising its concurrent jurisdiction as to distribution, was concluded by sentences of the Spiritual Court in granting administration, and not at liberty to re-examine the points decided in the exercise of that peculiar jurisdiction.” In that case, as in this, the suits were for different objects; one was for administration, the other for distribution; but the fact had been in issue between the same parties, and had been decided between the same parties. It appears, therefore, from Mr. Hargrave's account, that in the House of Lords the case of *Bouchier v. Taylor*, which was exactly similar to the present, was decided on that as one of the two grounds taken by the appellant; and if I am satisfied that Mr. Hargrave's representation of what passed is correct, and I have no reason whatever to doubt it, I am bound by that decision.

[*585]

It was, however, said in argument that that decision was previous to the opinion of the Judges in *The Duchess of Kingston's* case (1), the former being pronounced in March, 1776, the latter in April, of the same year. But no opinion expressed by the Judges in the House of Lords can be put in competition with a decision of that House, except so far as it is adopted by them. And, therefore, no opinion expressed by the Judges ought to weigh with me against

(1) 20 How. St. Tr. 355.

BARRS
 v.
 JACKSON.
 [*586]

the decision to which I have referred. The *only point, however, decided in *The Duchess of Kingston's* case, and which had no relation to this question, was this,—that the sentence of an Ecclesiastical Court in a suit of jactitation of marriage was not conclusive, as to the validity of the marriage, in a prosecution subsequently preferred against one of the parties for bigamy. The Judges further gave their opinion that even if it had been conclusive, still evidence was admissible to show that it was obtained by fraud. I have carefully read through the opinion of the Judges as delivered by Chief Justice DE GREY, and I have found nothing in it at variance with the decision in *Bouchier v. Taylor*; for the ground of their opinion was, that the two proceedings were between different parties, and that the decision of a question raised between Mr. Harvey and the Duchess of Kingston could not be conclusive in another proceeding between the Duchess of Kingston and the Crown.

Some observations were made upon the form of the sentence of the Ecclesiastical Court, as if in consequence of the form it ought not to be considered conclusive. The terms of the sentence were, that, as far as appeared by the evidence, Jackson had proved himself next of kin. That is the usual form of the sentence in such cases, and it is the form in *Bouchier v. Taylor*, “that, as far as appeared by the evidence, Dr. Bouchier had proved himself next of kin.” Therefore if any argument could be built upon the form of the sentence, it would have applied equally to that case as to the present: but it appears to me that nothing, in fact, turns upon the form of the sentence: for where the Court decides upon an issue of fact, it must be presumed to decide upon the evidence actually adduced before it, and therefore the sentences in these two cases express nothing more than *what is necessarily involved in every decision upon an issue of fact.

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But before the case of *Bouchier v. Taylor*, the same principle was laid down by Lord HARDWICKE in *Thomas v. Ketteriche* (1). In that case the question was litigated in the first instance in the Ecclesiastical Court, where both the parties were decided to be next of kin in equal degree, and administration was granted to Ketteriche, because Thomas was a minor. Afterwards a suit was instituted in this Court for distribution; Thomas the plaintiff claiming the entire residue, as sole next of kin, notwithstanding the decision in the Ecclesiastical Court; but Lord HARDWICKE held, that that

(1) 1 Ves. Sen. 333.

decision could not be controverted. It was observed that that was a question of law, but that seems to me to strengthen the authority of the case. It is true, that Lord HARDWICKE agreed with the Ecclesiastical Court in their conclusion, but he stated distinctly, that, at all events, he should have been bound by their decision. He says, "What would be the consequence if I were to decide contrary to the sentence of the Ecclesiastical Court, that the plaintiff was the sole next of kin? A suit for distribution might have been instituted in the Ecclesiastical Court, the two Courts having concurrent jurisdiction with respect to distribution. The Ecclesiastical Court would have been bound by the decision in the suit for administration; and it follows as a matter of course, that this Court must also be bound, otherwise the two Courts would come upon the same facts and circumstances to contradictory conclusions." That is the case also here. I have informed myself by communication with one of the highest authorities on this subject, that that decision as to the fact in the Prerogative Court, *in a suit for administration, being unappealed from, would, if the suit for distribution had been instituted in the Ecclesiastical Court, have been conclusive: and if it is conclusive there, it ought to be conclusive here.

BABBS
v.
JACKSON.

[*588]

A case before Lord Holt, *Blackam's* case, was also referred to (1), as leading to a contrary conclusion; but it appears to me to run in the same direction. Jane Blackam was the intestate; the plaintiff in the action stated that he had married her a short time before her death, and he claimed her goods as her husband; the defendant set up the administration granted to him, insisting that it never could have been granted to him but upon the supposition that there was no such marriage. The answer was, that that question had never been put in issue in the Ecclesiastical Court in granting administration, and that the judgment of that Court was only conclusive as to circumstances put in issue, not as to matters to be inferred from the judgment; and that corresponds exactly with what was stated by Lord Chief Justice DE GREY in the House of Lords,—matters directly put in issue and decided between the same parties are conclusive; but not matters that are only to be inferred from the judgment. That is the principle of the decision in *Blackam's* case. Lord HOLT's language is this: "A matter which has been directly determined by the sentence of the Ecclesiastical Court cannot be gainsaid: their sentence is conclusive

(1) 1 Salk. 291.

BARRS
v.
JACKSON.

[*589]

in such cases, and no evidence shall be admitted to prove the contrary: but that is to be intended only in the point directly tried; otherwise it is, if a collateral matter be collected or inferred from their sentence, as in this case. Because the administration was granted to the defendant, therefore they infer that the plaintiff was *not the intestate's husband, as he could not have been taken to be if the point there had been, married or unmarried, and their sentence had been not married." That decision, therefore, amounts to nothing more than this, that if the question had been put in issue and decided, the sentence would have been conclusive; but that, not having been put in issue, you are not to infer that fact from the sentence. And it is remarkable, that Lord MANSFIELD appears to have relied on that very case in moving the judgment of the House of Lords in *Bouchier v. Taylor*. "The doctrine of Lord HOLT," Mr. Hargrave says, "in *Blackam's* case, was cited, and Lord MANSFIELD read Lord HOLT's words out of Salkeld as the ground of his own opinion." It appears to me, therefore, that the authority of that case, so far from operating against the decision in *Bouchier v. Taylor*, tends most strongly to confirm it.

I do not enter into any of the general arguments in this case, or into the other authorities that were cited, none of which have so close a bearing upon it as those to which I have referred: nor is it necessary to do so; for if the point was decided by the House of Lords in *Bouchier v. Taylor*, as I think it was, I am bound by that decision, whatever opinion I might entertain adverse to it. The appeal, therefore, must be allowed.

HILLS v. NASH.

(1 Phillips, 591—599; S. C. 15 L. J. Ch. 107; 10 Jur. 148.)

1844.
March 22.

Lord
LANGDALE,
M.R.

On Appeal.
1845.
Dec. 20.

Lord
LYNDHURST,
L.C.

[594]

A defendant to a suit for winding up a partnership has a right to insist that the suit shall be so constituted as that the decree may be binding on all the parties to the partnership contract: and, therefore, a bill by one against another of five partners in a joint speculation, for an account and payment of the defendant's contributory share of an alleged loss on the winding up of the concern, was held to be defective as to parties, although it was alleged and proved that the plaintiff had, as managing partner, made all the advances himself, and that he had settled with and released the other copartners; and it was held that an undertaking by the plaintiff, to bear any liability which, on taking the accounts, might appear to subsist against the absent partners in favour of the defendant, would not cure the defect.

THE bill stated that in the month of April, 1840, the plaintiff, who was a corn merchant entered into a joint speculation with one

Nash, deceased, (the father of the defendants of that name, who were his executors,) and with the defendant Carpenter, and two other persons named Sheppard and Webb, for the purchase and sale of English wheat; the terms of the agreement between them, which was a verbal one, being, that they should be interested in the profits and losses of the adventure in the proportions of the quantities of foreign wheat which they then respectively held in bond. That these proportions were afterwards ascertained to be, and were, in fact, as follows: The plaintiff, 3-9ths, *Carpenter, 4-9ths, Webb, 1-9th, and Sheppard and Nash, 1-18th each. That the purchases and sales under the agreement were made partly by the plaintiff and partly by Carpenter, but principally by the plaintiff; that the speculation, after having gone on for three months, had resulted in a loss of 18,180*l.*; that it had since been wound up, and all liabilities in respect thereof fully discharged by the plaintiff; that Nash's share of the loss was 1,010*l.*; that Carpenter's, having been ascertained by arbitration, had been settled between him and the plaintiff; that Sheppard had paid his share, and that Webb (who was insolvent) had been released by the plaintiff from his share without any payment; and that none of those parties had any claim upon or liability to the estate of Nash in respect of the speculation. The bill prayed an account of all sums received and paid by the plaintiff under the agreement on the joint account of himself and the other parties to the adventure, and payment out of Nash's estate of his proportion of the loss.

HILLS
v.
NASH.

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Webb and Sheppard were not made parties; but they were examined as witnesses on the part of the plaintiff, and they confirmed by their evidence the case made by the bill.

The defendants, the Nash's, by their answer, stated that they knew nothing of the alleged agreement or speculation, and that they did not believe that their father had had any share in it; but submitted, that if it should appear that he had, Webb and Sheppard, as well as Carpenter, were necessary parties to the suit.

On the hearing of the cause before the MASTER OF THE ROLLS, his Lordship overruled the objection for want of parties, and made a decree declaring that the estate of *Nash was liable to the 1-18th share of the loss incurred in the speculation; and an account was directed of the dealings and transactions between the plaintiff and the several other parties to the speculation in respect thereof; and the Master was to ascertain what loss was incurred in it, with liberty to state any circumstances specially: and the plaintiff

[*596]

HILLS
v.
NASH.

undertaking to bear all liabilities (if any) which, in the enquiry so directed, might appear to subsist against Webb and Sheppard, in favour of the estate of Nash, it was ordered that the Master should enquire whether there were any and, if any, what claims outstanding in respect of the said speculation; and further directions and costs were reserved.

The defendants, the Nash's, appealed from the decree; and the appeal now coming on to be heard,

Mr. Wakefield and Mr. J. Parker for the appellants. * * *

[597] *Mr. Romilly and Mr. Piggott* for the respondent. * * *

Mr. Wakefield, in reply. * * *

1845.
Dec. 20.

THE LORD CHANCELLOR:

The plaintiff is a corn-factor. In the year 1840, he engaged in a speculation with the testator Nash, Carpenter, Sheppard, and Webb, for the purchase and sale of English wheat. The purchases and sales were to be made by the plaintiff and Carpenter—but principally by the former—on the joint account, and at the joint risk. The respective parties were to be interested in the adventure, according to the proportions in which they held foreign wheat at the time of the agreement. The dealing continued for about three months; at the expiration of which time a heavy loss had been sustained, *amounting to upwards of 18,000*l.* This suit was instituted to recover from the personal representatives of Nash his proportion of this loss.

[*598]

The defendants, the executors, by their answer insisted that Sheppard and Webb were necessary parties to the suit. The MASTER OF THE ROLLS overruled the objection, and the defendants, the executors, have appealed from that decision.

If the plaintiff had agreed separately with each of several individuals to engage with him in a speculation of this sort, and that each should be interested in the profit and loss in a certain proportion, a bill might have been filed against any one of them to obtain payment of his proportion of the loss, without making any of the other contractors parties; for this would have constituted so many separate contracts. But in the present case all the parties mutually contracted with each other to engage in this speculation, and to share the profit or loss. It was a mere case of partnership in a particular transaction or series of transactions, in which the

business was to be transacted, and the capital advanced, by two of the partners. According to the general rule, therefore, the bill being filed for an account of the partnership transactions by one of the partners against some of the other partners, all the rest ought to have been joined as parties to the suit. Is there any thing then in this case to take it out of the general rule?

The circumstances insisted upon are these: That Sheppard has paid what is stated to be his share of the loss, and has obtained a release from the plaintiff; that Webb is wholly unable to pay, and has been excused by the plaintiff; that the case between Carpenter and the plaintiff was referred to arbitration, *and the sum awarded has been paid to the plaintiff. But none of these transactions are binding upon Nash or his representatives, or can in any way affect their rights. It does not appear to me that they take the case out of the ordinary rule. If a decree should be obtained upon this record, it will not have any force against those who are not parties to the record. It would not be binding upon them, if any dispute should arise between these parties or any of them and Nash's executors as to the proportion of their contributions, or of their obligation to contribute to the loss, or respecting any other matter arising out of this transaction.

I think, therefore, the objection for want of parties ought in this case to have been allowed. This is the conclusion to which I have come, though it is not without doubt and hesitation that I have differed from the MASTER OF THE ROLLS upon a point of this nature.

HILLS
v.
NASH.

[*399]

HEIGHINGTON v. GRANT.

(1 Phillips, 600—604; S. C. 10 Jur. 21; affg. 11 L. J. Ch. 171.)

Mere neglect of duty in an executor, as, for instance, the omission to invest balances pursuant to a direction in the will, if unaccompanied by fraud, is not such misconduct as to disentitle him to the general costs of a suit for the administration of the estate, although it may subject him to the costs of so much of the suit as was occasioned by his neglect.

THIS was an appeal from a decretal order of the MASTER OF THE ROLLS, by which an executor and trustee, who had been charged by the decree with compound interest at 5 per cent., on balances which he had retained in his hands, and with the costs of so much of the suit as sought to charge him with such interest (the costs of the rest of the suit being reserved) was, on further directions, allowed

1844.
Feb. 5

Lord
LANGDALE,
M.R.

On Appeal.
1845.
Dec. 20.

Lord
LYNDHURST,
L.C.

[600]

HEIGHING-
TON
v.
GRANT.

his costs of the rest of the suit, as between solicitor and client, out of the estate.

[601]

Mr. Wakefield and *Mr. Shebbeare*, for the appeal, cited [*Raphael v. Boehm* (1), *Tebbs v. Carpenter* (2), and *Crackelt v. Bethune* (3) ; and said that in this case, if the defendant had not disputed his liability for such interest, the suit would never have been instituted].

Mr. Russell and *Mr. T. Parker*, for the respondent, showed from the record that the dispute about interest had not been the only occasion of the suit, inasmuch as the bill not only prayed the general execution of the trusts of the will, but contained other charges of misconduct against the defendant which had not been substantiated. * * *

Mr. Wakefield, in reply. * * *

1845.
Dec. 20.

[*602]

THE LORD CHANCELLOR :

This was an appeal from a decree on further directions *by the MASTER OF THE ROLLS as to the question of costs. The suit was against the defendant as executor of the will of Robert Heighington for the administration of the testator's estate. The bill prays that the rights of the plaintiffs under the will may be declared and ascertained ; that an account may be taken of the personal estate, not specifically bequeathed, and of such part as had been received by the defendant or might have been received, but for his wilful default ; that an account may also be taken of the testator's debts, funeral expenses, &c. ; and that the balance may be ascertained ; and that the defendant may be charged with interest on the balances in his hands with proper rests, &c.

The bill charged that the defendant had not invested the residue as directed by the will, and had employed the money in his business as a banker and shopkeeper. The defendant admitted that he had not invested the money, but denied that he had employed it in his business ; and he gave, among other things, as an explanation of the reason for not having invested it, that he had to pay money from time to time in and about the maintenance and support of the testator's family, agreeably to the directions of the will. He admitted that he had made interest of the money.

(1) 8 R. R. 95 (11 Ves. 92 ; 13 Ves. 590).

(2) 16 R. R. 224 (1 Madd. 290).

(3) 21 R. R. 241 (1 Jac. & W. 586).

The plaintiffs failed in that part of their case by which they sought to charge him for what, but for his wilful default, he might have received. The MASTER OF THE ROLLS, under these circumstances, directed that the defendant should have the costs of the suit, with the exception of the costs of that portion of it which the defendant had been ordered to pay to the plaintiffs. The plaintiffs object to this part of the decree. The cause had been several times, and in its different stages, *before the MASTER OF THE ROLLS, and he states, that this second charge in the bill had led in the progress of the cause to much discussion.

HEIGHING-
TON
v.
GRANT.

[*603]

No case of fraud was established against the defendant; neither were his accounts falsified in any material particular. But, undoubtedly, he ought to have invested the property agreeably to the directions of the will. In omitting to do this, he was guilty of negligence, and was properly charged with the costs arising out of that part of the case. With respect to the other part of the charge, the decision was in his favour, and he must, therefore, in all matters, except as to that for which he has paid the penalty, be taken to have acted correctly. I am of opinion, therefore, that he is entitled to costs as to the rest of the suit, and more especially as those costs have been occasioned, in fact, by the unfounded charge made against him. [His Lordship then referred to some Irish decisions to the same effect, and concluded by saying:]

The Court does not visit the improper holding of money, if there is nothing more, further than by charging the executor with interest; but if his account is falsified, if any thing like fraud appears, then the Court gives costs against him. I am of opinion, therefore, with the MASTER OF THE ROLLS, that the plaintiff is entitled to the costs which have been awarded to him by the decree.

[604]

BROWN v. BAMFORD (1).

(1 Phillips, 620—627; S. C. 15 L. J. Ch. 361; 10 Jur. 447; revg. 11 Sim. 127.)

A gift by will of leasehold and other personal estates to trustees in trust to pay the rents &c. to such person or persons as a married woman should, by writing under her hand from time to time, but not by way of anticipation, appoint, and, in default of such appointment, or so far as the same should not extend, into her proper hands for her sole and separate use, with a direction that her receipts, notwithstanding coverture, should be good discharges, and after her death in trust for her children. Held,

1845.
May 8.

SHADWELL,
V.-C.

On Appeal.

1846.

June.

Lord
LYNDHURST,
L.C.

[620]

(1) See the note to *Barrymore v. Ellis*, 42 R. R. p. 77.—O. A. S.

BROWN
v.
BAMFORD.

upon the particular terms of the gift, that the restraint on anticipation applied to an assignment by the married woman, of her separate estate as well as to an appointment in execution of her power, notwithstanding the will did not provide that her receipts alone should be good discharges.

[*621]

JOHN BECKETT, by his will, dated the 21st of September, 1832, gave certain leasehold houses and stock in the funds to trustees, upon trust, from time to time during the natural life of his daughter Sophia Bamford, or until she should be duly declared a bankrupt, or take the benefit of any Act for the relief of insolvent *debtors to pay the clear rents, interest, dividends, and proceeds thereof unto such person or persons for such intents and purposes, and in such manner as Sophia Bamford by any writing or writings under her hand, when, and as the same should become due, but not by way of assignment, charge, or other anticipation thereof should, notwithstanding her then present or any future coverture, direct or appoint; and in default of any such direction or appointment, or so far as the same, if incomplete, should not extend, into her proper hands for her sole and separate use, independent of the debts, control, or interference of her then present or any future husband; for which purpose, the testator thereby directed that the receipts in writing, under the hand of his daughter Sophia Bamford should, notwithstanding any such coverture as aforesaid, be good and sufficient discharges for the last-mentioned rents, interest, dividends, and proceeds, or so much thereof as should in such receipts, respectively, be expressed to have been received; and from and after the decease of his daughter Sophia Bamford, or such her bankruptcy or insolvency as aforesaid, which should first happen, then in trust for all and every, or such one or more of her children as therein mentioned.

Sophia Bamford having, by a paper writing under her hand, undertaken to guarantee a debt due to the plaintiffs from her son-in-law, who afterwards became bankrupt, this bill was filed praying a declaration that her income, under the deed, was liable to make good the debt, and for consequential relief. Sophia Bamford, her husband, and the trustees of the will put in a general demurrer to the bill, which the VICE-CHANCELLOR OF ENGLAND overruled.

[622]

The defendants appealed from that decision, and, after the appeal had been argued by *Mr. Bethell* and *Mr. Baily* for the appellant, and *Mr. Stuart* and *Mr. Simpson* for the respondent, the LORD CHANCELLOR expressed an opinion in conformity with that of the

VICE-CHANCELLOR; but afterwards desired that the case might be re-argued by one counsel on each side.

BROWN
v.
BAMFORD.

The appeal was, accordingly, now re-argued by

Mr. Bethell for the appellants.

Mr. Stuart for the respondents. * * *

THE LORD CHANCELLOR:

This was an appeal from an order of the VICE-CHANCELLOR OF ENGLAND. When the case came first before me, I expressed an opinion upon it, in accordance with the judgment of the VICE-CHANCELLOR; but afterwards, entertaining doubts as to the correctness of that opinion, I directed the case to be again argued. The result of that argument, and the subsequent consideration of the case, have led me to change the opinion I had previously formed. [His Lordship here read the clause of the will on which the question arose, and proceeded:]

1846.
June (1).
[624]

It was obviously the intention of the testator, that the income of this property should be kept entire, for the use of his daughter, and that it should not be charged or disposed of, except as the successive payments should become due—that it should not, in any way, be anticipated. It cannot reasonably be supposed that he would be so careful as he evidently was to exclude one mode of anticipation, and, at the same time, mean to have the property subject to alienation, even to its full extent, in another form.

The question, therefore, is, whether the terms made use of by the testator, are sufficient to enable the Court to give effect to that intention.

[625]

The trust is to pay the rents &c., “to such person as Sophia Bamford, by any writing under her hand, when and as the same shall become due, but not by way of assignment, charge, or other anticipation thereof, shall direct or appoint, and in default of any such direction or appointment, or so far as the same, if incomplete, shall not extend, into her proper hands, for her sole and separate use.” The right to appoint is not to be exercised till the rents or other income become due, and then only to the extent of what is so due. In default of any such appointment, the rents &c. then due, and those only, or so much of them as shall not have been appropriated by the appointment, are to be paid into her own hands. All this is very clearly and precisely expressed.

BROWN
 v.
 BAMFORD.

The negative words in the clause, viz. "But not by way of assignment, charge, or other anticipation," remain to be considered. The question depends upon the effect of these words. The daughter Sophia Bamford is not allowed, by means of any assignment, charge, or other anticipation, to direct the payment or application of the rents &c. by the trustees. But any assignment, charge, or anticipation, if effectual, would operate as a direction; and this was evidently so considered by the testator or other person who framed this clause. The effect, therefore, of the prohibition is, to restrain Sophia Bamford from assigning, charging, or in any manner anticipating the income, or exercising any dominion or control over her life estate, except in the form, and under the restrictions, contained in the power of appointment. She is precluded from assigning, [*626] *charging, or in any manner anticipating the rents or other income, but she is permitted when and as they become due, but not before, to direct the application of them, and in default of any such direction, they are to be paid into her own hands. I think this is the true construction of the clause, and it corresponds with what I consider to have been the intention of the testator, viz. that the continuance of the income during his daughter's life, should be secured for her benefit.

The case does not depend, in any degree, upon the terms of the receipt clause. The observations of the learned Judge, upon this point, appear to have arisen from what occurred incidentally in the course of the discussion. I certainly do not understand that the decision was rested upon any such ground. His Honour considered that the case came within the principle upon which he had decided that of *Barrymore v. Ellis* (1), viz., that where a limited power of appointment is created, and, in default of the execution of such power, the estate is given generally to the same person, it is competent to the donee to dispose of the estate without regard to the power; the execution of which he is at liberty to waive or abandon.

The question, however, is not as to the principle so stated, but as to the application of it to the present case. I think it has no such application; that the restriction against anticipation extends to the whole gift; that this is the true construction of the bequest, and that it corresponds with what appears to have been the manifest intention of the testator.

I may further observe, that the clause in question, is, in all its [*627] material parts, the same as in the settlement *stated in the case of

(1) See 42 R. R. 77.

Barton v. Briscoe (1). That case was very much considered, both by the Court and at the Bar; but it would have been wholly unnecessary to discuss the important question there decided, if it had been supposed that the clause would have admitted of the interpretation put upon it in the present instance by the VICE-CHANCELLOR.

The appeal must be allowed, and the demurrer allowed, but without costs.

BROWN
v.
BAMFORD.

BAGGETT v. MEUX.

(1 Phillips, 627—628; S. C. 15 L. J. Ch. 262; 10 Jur. 213; affg. 1 Coll. 138; 13 L. J. Ch. 228; 8 Jur. 391.)

1846.
March 19.

KNIGHT
BRUCE, V.-C.
On Appeal.
Lord
LYNDHURST,
L.C.

A court of equity will give effect during coverture to a clause in restraint of alienation, annexed to a gift to a married woman for her separate use, whether the subject of the gift be real or personal estate, or whether it be in fee or only for life.

On the hearing of an appeal in this case from the decree of Vice-Chancellor KNIGHT BRUCE (2) the argument turned chiefly on the question, whether a clause in restraint of alienation, annexed to a legal devise, in fee, of real estate to a married woman for her separate use, was effectual during the coverture.

[627]

Mr. Russell and *Mr. Freeling*, for the appellant, in support of the negative, attempted to distinguish the case of real from that of personal estate, on the ground that both the property of a married woman in the latter, and her power of disposition over it, being creatures of equity, might, by the same jurisdiction, be modified and restricted to any extent; but that in the case of real estate, which a married woman had power to dispose of by the common law, that power could not be controlled *by the terms of the gift, any more than in the case of a male. They also observed that the Irish Fines and Recoveries Act (3) contained an express proviso that the clauses relating to conveyances by married women should not apply to cases in which there was, by the terms of the gift, a restraint on alienation; whereas there was no such proviso in the English Act.

[*628]

In answer to which,

The LORD CHANCELLOR observed, that the Irish Act was subsequent in date to the other, and that he took that clause to be an expression by the Legislature of what was meant by the former Act.

(1) Jac. 603. See 34 R. B. 60.

(3) 4 & 5 Will. IV. c. 92, s. 79.

(2) Reported in 1 Coll. 138.

BAGGETT
v.
MEUX.

Mr. Swanston and Mr. Busk, contra.

THE LORD CHANCELLOR, after disposing of the other points of the case in a few words, said, with respect to this :

After the case of *Tullett v. Armstrong* (1), there can be no doubt about the doctrine of this Court respecting the property given to the separate use of a married woman : and it is clear that that doctrine applies as much to an estate in fee as to a life estate. The object of the doctrine was to give a married woman the enjoyment of property independent of her husband ; but to secure that object, it was absolutely necessary to restrain her during coverture from alienation. The reasoning evidently applies to a fee as much as to a life estate, to real property as much as to personal. The power of a married woman, independent of the trust for separate use, may be different in real estate from what it is in personal : but a court of equity having created in both a new species of estate, may in both cases modify the incidents of that estate.

Appeal dismissed, with costs.

FOSTER v. SMITH (2).

(1 Phillips, 629—633 ; S. C. 15 L. J. Ch. 183 ; revg. 2 Y. & C. C. C. 193.)

1845.
March 4, 6.
KNIGHT
BRUCE, V.-C.
On Appeal.
Lord
LYNDHURST,
L.C.
[629]

Upon a devise of real estates in trust, to receive the rents, and thereout to pay to the testator's widow an annuity, and "from and immediately after her death" to convey the estates to his three sisters : Held (reversing the decision below), that the annuity was a charge only on the rents which accrued during the life of the widow, and not on the *corpus* of the estates.

THE question in this case arose upon the construction of a will, by which the testator devised his freehold and leasehold estates to trustees, on trust to receive the rents, issues, and profits thereof, when and as they should become due and payable, and thereout to pay to his wife, if she should survive him, the clear annuity of 200*l.* during the term of her natural life, for her sole and separate use, and not to be subject to the control or engagements of any future husband ; the said annuity to be paid by four equal quarterly payments, on Lady Day, Midsummer Day, Michaelmas Day, and Christmas Day, without any deduction for taxes ; the first quarterly payment to be made on such of the said days as should happen next after the testator's decease and from and immediately after the decease of his wife, then upon this further trust, that they, his

(1) 48 R. B. 127 (4 My. & Cr. 377). Cas. 588, 49 L. J. Ch. 829, 43 L. T.
(2) *Carmichael v. Gee* (1880) 5 App. 227.

said trustees, or the survivor &c., should convey and assign his said freehold estate unto and to the use of his three sisters, their heirs and assigns for ever as tenants in common : and upon this further trust, as to his said leasehold estate, that upon and immediately after the decease of his said wife, they, his said trustees, or &c., should assign all and singular his said leasehold premises to his said three sisters, to hold to them, their executors, &c., for all the residue of the terms which might then be unexpired therein, in equal shares, and upon and for no other use, trust, or purpose whatsoever. And he named the same three sisters his residuary legatees.

FOSTER
v.
SMITH.

The testator died in 1823. For some years after his death the rents of the estates were sufficient to pay the *annuity to the widow ; but afterwards they became insufficient ; and upon her death in July, 1839, there was an arrear of 466*l.* due to her, which her executors prayed by this bill might be raised by sale or mortgage of the estates. And the Vice-Chancellor KNIGHT BRUCE being of opinion that the annuity was a charge on the *corpus* of the estates, decreed accordingly.

[*630]

An appeal by the sisters from that decision now came on to be heard.

Mr. Anderdon and *Mr. Willcock*, for the plaintiffs in support of the decree :

* * A trust to be performed out of rents and profits will be construed a charge on the *corpus*, unless there is something in the context inconsistent with such construction : *Allan v. Backhouse* (1). Here, the only indication of a contrary intention is the direction "from and immediately after the death of the widow, to convey the estates to the sisters." But in *Baines v. Dixon* (2), where there was a similar direction, Lord HARDWICKE says, "There have been many cases of devises to trustees to pay debts out of profits, and then to convey the *lands : yet that shall not hinder a sale, and never has been thought sufficient to limit profits to annual profits, which would overturn many cases." In this case, "from and immediately after her decease," means, after satisfaction of the previous trusts.

[*631]

THE LORD CHANCELLOR :

The testator evidently did not contemplate that the rents would

(1) 13 R. R. 23 (2 V. & B. 65).

(2) 1 Ves. Sen. 41.

FOSTER
v.
SMITH.

be deficient: it is impossible to speculate on what he would have done if he had foreseen the deficiency. The only question is, what the words import. You propose to introduce another term—that if the rents be insufficient, then the trustees shall continue to receive the rents after the death of the widow until the annuity shall be satisfied, and then convey. It would be a very different thing if there were, in the first instance, a gift of an annuity, and a charge of it upon the estate, and then a direction to the trustees to pay it out of the rents.

Mr. Anderdon:

If the intention had been, to confine the charge to the rents which should accrue during the life of the annuitant, the obvious way of giving effect to it would have been to limit the estate to the trustees during her lifetime, and then over to the sisters.

Mr. Wigram and Mr. Toller, for the appellants:

[*632]

The principle of *Allan v. Backhouse* and that class of cases is founded upon the necessity of raising a gross sum at a particular time, and has but little application to a case like the present. And what Lord HARDWICKE says in *Baines v. Dixon* refers to the debts, not to the legacies, which he held to be payable out of the annual rents only, and not out of the *corpus*, relying upon the *words “as the profits of the estate should advance the money.” There is, at least, as strong an indication of a similar intention here in the direction to pay the annuity out of the rents “as and when they should accrue,” and to convey the estates “from and immediately after the death of the widow.” The Court is asked to say that the estate shall not go over in the very event in which the will says it shall. * * *

Mr. Anderdon, in reply.

THE LORD CHANCELLOR, after stating the will and the circumstances out of which the question arose, proceeded as follows:

[*633]

There can be no doubt that, if the trust had simply been to receive the rents, issues, and profits of the estates, when and as the same should become due and payable, and thereout to pay to his wife, if she should survive the testator, an annuity of 200*l.* for her life, that this would have been a charge upon the rents &c., until the whole amount of the annuity with the *arrears had been

paid. And the trustees after the death of the widow would have been bound to apply the rents, &c. accordingly. But in this case a new trust arises on her death; for the trustees are directed, "from and immediately after" that event, to convey the estate to the sisters; and if they perform their trust, which I think they are bound to do, they would be disabled from applying the subsequent rents to the discharge of the arrears. To obviate this, it is proposed to construe the direction to convey to the sisters on the death of the widow, as if it had been a direction to convey, subject to the annuity. But this would be essentially to alter the testator's will; in fact to make a new will. And I think there is nothing in the will to justify it.

The testator seems to have considered that the rents &c. would have been more than sufficient to pay the annuity, and he gives whatever surplus there might be to his sisters, together with the estates on the death of the widow. What he might have done if he had foreseen that the rents would have been insufficient to pay the annuity, it is impossible, I think, with any certainty to determine.

Viewing the case in this light, I am compelled to differ from the VICE-CHANCELLOR in the interpretation he has put upon this will, which however, his Honour does not appear to have considered as altogether free from doubt.

FOSTER
v.
SMITH.

THE MARQUIS OF BUTE v. THE GLAMORGANSHIRE CANAL COMPANY.

(1 Phillips, 681—686; S. C. 15 L. J. Ch. 60.)

1846.
—
Lord
LYNDHURST,
L.C.

[681]

A statement in an answer that certain documents admitted to be in the defendant's possession form part of the evidence of his title, and do not form part of the title of the plaintiff to the premises in question, is not sufficient to protect them from production on motion, if they be in their nature such as may furnish evidence in support of the plaintiff's case, and the answer does not distinctly deny that they do.

Semble, a defendant who has answered cannot resist a motion for production of documents referred to in his answer, on the ground that the bill is open to a general demurrer for want of equity.

THIS was a renewal, before the Lord Chancellor, of a motion which had been refused by the VICE-CHANCELLOR OF ENGLAND, for the production of the documents mentioned in the schedule to the answer.

Mr. Stuart and Mr. James, for the motion.

THE
MARQUIS OF
BUTE
v.
THE
GLAMORGAN-
SHIRE CANAL
COMPANY.

Mr. Bethell and Mr. Colvile, contra.

The material parts of the pleadings, and the points taken in the argument, are fully stated in the judgment.

THE LORD CHANCELLOR :

The bill states that a narrow strip of land, containing seventeen acres more or less, part of a larger piece, was purchased by the defendants under the authority of an Act of Parliament in the year 1803, from the then owners under whom the plaintiff claims title ; that, upon the land so conveyed, the canal, towing-paths, and other works were or had been formed ; that this strip of land was divided from the remaining portion by a ditch, which ran the whole length of it, and formed the boundary between the two properties. It then stated that, by different modes described in the bill, the defendants had gradually encroached upon the plaintiff's land, filling up the ditch, or the greater part of it, and obliterating [*682] *the boundary ; that quays and wharfs had been built along the canal upon land obtained for the purpose from the plaintiff, and that the defendants had received payments and acknowledgments by the parties occupying the quays and wharfs, which payments, though made in the first instance in respect merely of frontage, or of some benefit or accommodation received from the Company, had in process of time been claimed and received as rent for a portion of the land covered by the quays and wharfs ; that these occupiers were fifty in number, and that it would be impracticable to proceed at law for the purpose of defining the boundaries or recovering the possession. The bill then, anticipating the defence of the Statute of Limitations, charged that the various acts of encroachment before-mentioned had been going on gradually and continually until a very recent period ; that the defendants now claimed to be entitled to twenty-four acres, being seven acres more than the original grant, and had put down boundary stones to mark the extent of their claim : the plaintiff therefore prayed, among other things, for a commission to ascertain and settle the boundaries.

The defendants, in their answer, denied the particular acts of encroachment with which they were charged by the bill, and stated that the filling up of the ditch, which they admitted to have been the original boundary, was not their doing, but the result, in part, of acts of the plaintiff's own agents, but chiefly of the occupiers of

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the quays and wharfs, who (they said) had commenced the buildings upon the land of the defendants before they applied for additional land to the plaintiff, and had then filled up the ditch for the purpose of uniting the two: that those parties were their tenants, and that the payments were made in respect of the rent due from them as such tenants. The defendants admitted that *the number of acres which they now claimed was greater than that specified in their conveyance from the plaintiff's ancestor; but they insisted that, if there had been any encroachment, they had been in undisturbed possession of what they now claim for more than twenty years, and they relied upon the statute.

The plaintiff, in his bill, charged that the defendants were in possession of several maps, surveys, and other documents relating to the matters mentioned in the bill, and from which, if produced, the truth of such several matters would appear. The defendants admitted, in their answer, that they had in their possession divers maps, surveys, and other documents relating to the matters aforesaid, and set out a list of them in a schedule: they also set out in another schedule a list of the leases which they had from time to time granted to the occupiers of the quays and wharfs; but added, that they formed part of the evidence of the title of the defendants, and did not form part of the title of the plaintiff to the premises comprised therein.

The usual motion was made before the Vice-Chancellor of England for the production of the documents in question. This motion was refused with costs: the grounds of the refusal are not stated in the copy of the judgment which has been handed to me. It merely mentions, that the learned Judge had read the bill and answer, and that he was of opinion that there was no case for the production.

The plaintiff has moved to discharge that order. The question is whether, having regard to the statement on the record, the plaintiff is entitled to the production.

It is objected that this is a dispute between two contiguous proprietors as to their actual boundaries, that the remedy is at law, and that there is no ground for equitable interference. The rule, as I apprehend, is this, that the mere confusion of boundaries between adjacent proprietors will not support a bill for a commission: there must be some equity arising out of the conduct or acts of the party against whom the commission is prayed, or the bill must be brought for the purpose of preventing a multiplicity of

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suits. In the case of *Wake v. Conyers* (1) referred to by the defendants, it is stated by the Lord Keeper (NORTHINGTON), that the Court will entertain such a bill “where there might have been a multiplicity of suits, or where the confusion has been created by the act of the parties, as where a party has ploughed too near another, or the like.” I think the allegations in this bill present a case which, if substantiated by evidence, would entitle the plaintiff to a commission: the bill states a system of gradual encroachment on the part of the defendants, the filling up of the ditch, and obliterating the boundaries; and, further, the necessity, if this Court should not interfere, of bringing a great number of actions against different parties, in order to fix the boundaries and establish the plaintiff’s right.

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I cannot, therefore, refuse the production on the ground taken at the Bar, that no case for a commission has been made by the bill. If that indeed were so, the defendants might have demurred, and protected themselves from the discovery. But they have not thought proper to pursue that course; and, the possession of documents relating to the plaintiff’s case being admitted, they are bound to produce them, unless they can show some special reason to excuse it. As to the *greater part, no reason is assigned why they should not be produced, except that they are their private books and relate to their general business—that they are in frequent use and cannot be removed: with respect to these the Court will do what is usual in such cases,—order that they should be inspected at the office of the defendants at convenient times, and that such parts as do not relate to the matters in question in the cause may be sealed up on the usual affidavit. With respect to the leases, it is stated in the answer that they form part of the evidence of the title of the defendants, and do not form part of the title of the plaintiff to the premises in question. I think this is not sufficient: they are not asked for as evidence of the plaintiff’s title in the ordinary sense of the word, but as evidence of the allegations in the bill to entitle the plaintiff to a commission. I do not, therefore, think this averment in the answer sufficient to excuse the production. The case in this respect is not unlike that of *The Duke of Beaufort v. Smith* (2), decided first by the Vice-Chancellor WIGRAM, and which afterwards came before me upon appeal.

It was further contended that the charges in the bill, upon which

(1) 1 Eden, 331.

(2) 58 R. R. 160, 173 (1 Hare, 507).

alone the suit could be supported, were contradicted by the answer, and that, until the right to maintain the suit should be established, the Court ought not to order the production of the documents; and the case of *Adams v. Fisher* (1) was cited in support *of this position. But the right to maintain the suit is the very question to be tried, and the production of the documents is required with a view to the evidence, and for the purpose of establishing the right. They may be, and several of them are, I think, obviously material for that purpose (2). In the case of *Adams v. Fisher*, the ground upon which Lord COTTENHAM's decision proceeded appears to have been, that it was evident from the nature of the documents, the production of which was required, that they would not assist in establishing the plaintiff's equity: they were merely consequent upon it. "Whatever," he said, "may make out the plaintiff's title, he may have a right to see. The documents in question, however, are not to make out Adams's title to have the bills taxed, and the production of them could not possibly aid the assertion of the equity which Adams has asserted by his bill."

I am of opinion, therefore, that the order should be discharged, and that the documents ought to be produced.

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CARPMAEL v. POWIS.

(1 Phillips, 687—693; affg. 9 Beav. 16; S. C. 15 L. J. Ch. 275.)

The privilege of communications between solicitor and client extends to all matters within the scope of the ordinary duties of a solicitor, and the sale of estates being one of such matters, it was held that a solicitor was not at liberty to disclose what had passed in conversations which he had had either with the client or the agent of the client, relative to the amount of the bidding to be reserved upon the sale of an estate in

1846.
March 25.
Lord
LANGDALE,
M.R.
On Appeal.
Lord
LYNDHURST,
L.C.
[687]

(1) 45 R. R. 328 (3 My. & Cr. 526). The argument of the respondents on this point, as regarded the leases, was that, from their nature, they could not afford evidence of any part of the plaintiff's case, except that which went to rebut the defence of the Statute of Limitations; and that as all the allegations of the bill which imputed to the defendants the obliteration and confusion of the boundaries, (and which, it was contended, constituted the sole foundation of his right to equitable relief,) were denied

by the answer, the plaintiff was, on the principle of *Adams v. Fisher*, not entitled to the production of any documents which were material only to a subordinate issue in the cause. It was not adverted to in this argument, or perhaps in the answer above given to it, that the leases were all more than twenty years old, the latest of them being dated in the year 1815.

(2) The only documents comprised in the schedule besides the leases were certain maps and plans, and two minute books.

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which he had been concerned for him, or to other matters connected with such sale.

But, *semble*, if the agent had been examined he would have been bound to answer.

THIS was an appeal from an order of the MASTER OF THE ROLLS allowing a demurrer by a solicitor to certain interrogatories exhibited for his examination in the cause on the part of the plaintiff.

The object of the suit was to rectify an annuity deed by which, in consideration of 1,800*l.*, the purchase-money of an estate which the plaintiff had previously agreed to buy from the defendant Letitia Powis, he had granted her an annuity of 176*l.* 10*s.* for her life, but which he insisted by his bill ought to have been only an annuity of 156*l.* 6*s.* 9*d.*, alleging that, according to a verbal agreement made between himself and Thomas Powis, the brother of Letitia, as her agent (and who was also a defendant in the character of trustee under the annuity deed), the amount of the annuity to be granted by the plaintiff was to be determined with reference to the rate at which Government annuities were granted on a particular day, and that Thomas Powis, having undertaken to ascertain that rate from a friend of his in the Government Annuity Office, had, owing to a mistake of his informant, stated it to the plaintiff at nearly 22*l.* more than it really was, and that the parties had acted upon that mistake in determining the amount of the annuity which was inserted in the deed.

[*688] The bill suggested a pretence by the defendant that the estate had been purchased by the plaintiff at an under value; and it charged, amongst other things, that *previously to the sale to the plaintiff, the defendant had given instructions to her solicitor to sell it by auction, and had sanctioned a reserved bidding of less amount than the sum of 1,800*l.*, which the plaintiff had agreed to give.

The defence set up by Letitia Powis was, that she had given her brother no authority in the matter except to inquire for her what amount of life annuity she could purchase with the proceeds of the estate; that he had never communicated to her the particulars of his alleged treaty with the plaintiff, but had merely informed her that the plaintiff had offered to grant her an annuity of 176*l.* 10*s.*, which offer she had, after some hesitation, authorized him to accept, and that she would not have accepted an offer of less amount.

The witness was the solicitor employed by Letitia Powis in the sale of the estate and in the purchase of the annuity.

The interrogatories demurred to were four in number.

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POWIS.

By the first, the witness was asked whether he had not, previously to the sale of the estate, some conversation with the defendant, Letitia Powis, as to putting a reserve bidding upon it in the event of its being putting up to auction, and as to the investment of the proceeds; and he was required to set forth the particulars of such conversation.

In his answer to that interrogatory, he admitted that such conversation had taken place between him and the defendant; but he declined to state the particulars, "on the ground that they were confidential communications between the defendant and himself as her solicitor."

The two next interrogatories related to two interviews between the witness and Thomas Powis, and to the conversations supposed to have taken place therein, relative to the transaction in question.

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In answer to those interrogatories, the witness admitted that such interviews had occurred; but he declined to state the conversation which had taken place at them, "as, in all his communications with Thomas Powis on the subject of the transaction in question, he considered and treated him as representing his client, and as being the medium of communication between her and himself as her solicitor."

"For the same reason," he declined to answer the other interrogatory, whether Thomas Powis ever told him that he was or was not authorized to agree with the plaintiff as to the amount of the annuity to be granted to the defendant Letitia Powis.

Mr. James Parker and *Mr. Stevens*, for the plaintiff, the appellant.

Mr. Malins and *Mr. Baggalley*, for Letitia Powis.

* * * *

On the conclusion of the argument,

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THE LORD CHANCELLOR said :

I am of opinion that the privilege extends to all communications between a solicitor, as such, and his client, relating to matters within the ordinary scope of a solicitor's duty. Now it cannot be denied that it is an ordinary part of a solicitor's business to treat for the sale or purchase of estates for his clients. For some purposes his intervention is indispensable in such transactions: he is to draw the agreements, to investigate the title, to prepare the conveyance.

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All these things are in the common course of his business. But it is said that the fixing of a reserved bidding and other matters connected with the sale are not of that character, inasmuch as they might be entrusted equally well to any one else. It is impossible, however, to split the duties in that manner without getting into inextricable confusion. I consider them all parts of one transaction—the sale of an estate: and that a transaction in which solicitors are ordinarily employed by their clients. That being the case, I consider that all communications which may have taken place between the witness and his client in reference to that transaction are privileged.

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The only other question is, whether the same privilege extends to the case of an intermediate agent. Upon that point *Walker v. Wildman* (1) is precisely in point. There the communications were partly with the defendant and partly with her son, and Sir JOHN LEACH thought both were within the privilege. And it is to be observed that he does not rest his decision *on the necessity of the case; for it appears that the defendant was able to write, and it would seem, therefore, that there was no necessity for employing her son. The principle is laid down in the most general terms. And, so far as the solicitor is concerned, I do not see why it should not be so. It is not necessary to give any opinion as to what would be the case if the intermediate agent were examined. It may be that there you must go upon the necessity of the case. But here I have only the solicitor before me, which is a different thing.

As to the insufficiency of averment that the brother was the agent, I think that when the witness says he considered and treated him as his sister's agent, he must be taken to mean that he believed him to be so. And, indeed, it is impossible not to come to the conclusion, in point of fact, that the brother was the agent. The sister was not a person of business; and it was natural she should employ her brother's services in such a transaction. Besides, why should he have communicated with the solicitor at all if he was not acting for his sister?

I think, therefore, that, upon all the points, the decision of the MASTER OF THE ROLLS was right. I say nothing as to how I should have decided if the question had been put to the agent, and it were not clearly necessary that an agent should be employed.

Appeal dismissed with costs.

DAVENPORT *v.* BISHOPP (1).

(1 Phillips, 698-705; affg. 2 Y. & C. C. C. 451; 12 L. J. Ch. 492; 7 Jur. 1077.)

In a marriage settlement, which comprised only the property of the wife, it was agreed between the intended husband and wife, and each of them covenanted with the trustees, that any property to which the wife might become entitled during the coverture, should be conveyed to such uses as she should by deed or will appoint, and in default of appointment, to the use of herself for life, remainder to the use of the husband for his life, remainder to the use of the wife's children, and in default of such children, to the use of A. B. (her niece) and her heirs. After the death of the wife without children, and without having exercised her power of appointment, the husband filed a bill against her heir-at-law, praying that a real estate, to which she had become entitled during her lifetime, might be conveyed to the uses of the settlement. On the question whether the decree for specific performance should be confined to the life estate of the husband, or should extend to the limitation to the niece (who was also dead): Held, that it should extend to the latter, on the ground that the right of the husband to a specific performance of part of the covenant drew with it the right to a specific performance of the whole, at least as against the heir of the settlor, whatever it might have done as against a purchaser for value.

1843.
July 3, 10.
KNIGHT
BRUCE, V.-C.
On Appeal.
1845.
Nov. 10, 11.
1846.
July.
Lord
LYNDHURST,
L.C.
[698]

THIS was an appeal from a decree of Vice-Chancellor KNIGHT BRUCE [whose judgment to the effect stated in the above head-note was affirmed on this appeal].

The material facts of the case * * are briefly stated in the LORD CHANCELLOR'S judgment.

Mr. Tinney, Mr. Cooper, and Mr. Metcalfe appeared for the appellant, *Mrs. Bishopp*.

Mr. Bethell and Mr. Amphlett for the respondent, the heirs of Miss Lucas.

Mr. Randall for the plaintiff.

* * * * *

The case of *Sutton v. Chetwynd* (2) was relied on by the appellant's counsel as showing that the Court would not have lent its aid to the heirs of Miss Lucas if they had been plaintiffs. * * *

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Mr. Tinney, in reply. * * *

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THE LORD CHANCELLOR :

The facts of this case are fully stated in the report of the judgment of the VICE-CHANCELLOR.

1846.
July.
[703]

Upon the treaty for a marriage between Samuel Davenport and Eleanora Roberts, it was, by the deeds then executed, among other

(1) *In re Cameron and Wells* (1887) (2) 3 Mer. 249.
37 Ch. D. 32, 36.

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things, agreed by and between Samuel Davenport and E. Roberts, and each of them covenanted and agreed with the trustees, that, if the said E. Roberts should thereafter during the coverture become entitled to any property, real or personal, by any devise, gift, bequest, or otherwise, such property should be conveyed to trustees, so as that the same should be limited to such purposes as the said E. Roberts should, by deed or will, appoint, and, in default of appointment, to the sole and separate use of E. Roberts for life, and after her decease, to the use of S. Davenport for life, with remainder to the child or children of E. Roberts; but if there should be no such child or children, or descendant of any such child or children, living at the death of the survivor of S. Davenport and E. Roberts, then to the use of her niece Mary Lucas, her heirs and assigns for ever.

Mary Lucas was the daughter of Mrs. Bishopp, the sister of E. Roberts, afterwards E. Davenport. She died unmarried in 1823. In 1818, Nedham Cheselden, an uncle of Mrs. Davenport and of her sister Mrs. Bishopp, devised certain estates to trustees to the use of his wife for life, with remainder to the use of Mary Bishopp, his niece, for life, with remainder to Mary Lucas, her daughter by a former husband, for life, with remainder *unto his own right heirs. Mrs. Davenport and Mrs. Bishopp were his co-heiresses. Mrs. Davenport died in 1839; Mrs. Bishopp survived her, and was her heiress-at-law. Mrs. Davenport never exercised her power of appointment.

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The bill, which was filed by S. Davenport, prayed that Mrs. Bishopp, as the heiress-at-law of Mrs. Davenport, might be decreed specifically to perform the covenant contained in the settlement as to the estate devised by the will of Nedham Cheselden, so as to vest one moiety thereof, subject to the life interest of Mrs. Bishopp, in the surviving trustee, to the uses expressed in the settlement.

In this case there was an express covenant between E. Roberts, afterwards Mrs. Davenport, and her intended husband, and with the trustees, that any estate which might come to her during her coverture should be conveyed to trustees, to the uses expressed in the settlement.

This covenant was entered into for a valuable consideration, namely, the marriage between the parties. There is no reason, therefore, why the Court should not give effect to the covenant with S. Davenport by decreeing a specific performance. It is, I think, immaterial in this case that Mary Lucas was no party to the consideration.

In the case of *Sutton v. Chetwynd*, which was relied upon in the argument for the appellant, the covenant was between Lady Bath and the trustees only. There was no consideration moving from them or from Sir Richard Sutton. With respect to Sir James Pulteney, he merely consented to the settlement. Lady Bath did *not covenant with him. In the present case, the parties to the consideration,—viz. the marriage,—mutually and in express terms covenanted with each other as well as with the trustees.

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BISHOPP.

[*705]

Instances were cited of marriage settlements, which were, as to some of the limitations, considered to be voluntary, and were set aside in favour of purchasers. But this is not the case of a purchaser, and it is unnecessary, therefore, to consider how far those cases are in other respects distinguishable from the present. In *Goring v. Nash* (1), Lord HARDWICKE observes: "The strict measure which governs the Court in a question between persons who come to carry articles into execution and purchasers, is not the rule of this Court (between families), for between families the Court have considered whether a superior or inferior equity arises on the part of the person who comes for a specific performance." "It is one consideration," he adds, "how far the Court will support agreements of this kind against relations in a family, and another against purchasers and creditors."

I may further observe, that, as far as S. Davenport himself is concerned, it is not disputed that a specific performance would be executed; but the Court, being in possession of the cause, will not divide the covenant, and decreeing a special performance in favour of the plaintiff as to part, send him to law as to the residue. Lord HARDWICKE, in the same case of *Goring v. Nash*, observes, that where marriage articles have been decreed at all, they have been carried into execution even as to collaterals, and not carried into execution in part only. I think, therefore, the judgment must be affirmed.

1844.
Nov. 12.
1845.
Jan. 20.

FORBES v. PEACOCK.

(1 Phillips, 717—723; S. C. 15 L. J. Ch. 371; revg. 12 Sim. 528; 7 Jur. 688.)

The rule which relieves a purchaser from seeing to the application of the purchase-money, when the estate is subject to a primary general charge of debts, has reference to the time of the testator's death, and does not cease to be applicable, though the debts be subsequently paid; and, therefore, where an estate so charged was sold by the trustee, it was held that the

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V.-C.

On Appeal.
1846.

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L.C.

(1) 3 Atk. 190.

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PEACOCK.

cestuis que trust were not necessary parties to the conveyance, though the sale did not take place till twenty-five years after the testator's death, and the vendor, on being asked by the purchaser whether all the debts were not paid, had refused to answer the question.

THIS was an appeal from a decision of the VICE-CHANCELLOR OF ENGLAND, whose judgment, with all the particulars of the case, is reported in the 12th vol. of Mr. Simons's reports, p. 528 (1).

It will be seen from that report that the material circumstances of the case were shortly these: A testator, after directing all his just debts to be paid, devised his real estate to his wife for her life with power to sell it, in case a good offer should be made, and invest the proceeds in the funds; with a direction that, if not previously sold, it should be disposed of at her death, and that the proceeds should be divided, with the residue of his property, among certain persons; and he appointed three persons executors and trustees of his will. The testator's widow survived him twenty-five years; and, on her death, in the year 1840, the plaintiff, who was then the sole surviving trustee, contracted to sell the estate to the defendant.

In the course of the investigation of the title before the Master, the defendant enquired of the plaintiff, whether all the debts were paid, to which question the plaintiff refused to give any answer. The Master, nevertheless, reported in favour of the title. The defendant took exceptions to the report, on the ground, amongst others, that as the length of time since the testator's death, and the refusal of the plaintiff to answer his question, afforded a presumption that all the debts had been paid, the plaintiff could no longer give a valid discharge for the purchase-money without the concurrence of the cestuis que trust.

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The VICE-CHANCELLOR allowed that exception, and on further directions dismissed the bill, thereby overruling *Page v. Adam* (2).

The appeal now came on to be argued by

Mr. Cooper and *Mr. James Parker*, for the plaintiff (the appellant).

Mr. Coote and *Mr. Bird*, for the defendant.

The counsel for the appellant [cited] *Johnson v. Kennett* (3), confirmed extra-judicially by Lord COTTENHAM in *Eland v. Eland* (4), and adopted by the MASTER OF THE ROLLS in *Page v. Adam*, "that

(1) See 56 R. R. 103.

(2) 55 R. R. 70 (4 Beav. 469).

(3) 41 R. R. 145 (3 My. & K. 631).

(4) 48 R. R. 134 (4 My. & Cr. 429).

the rule which, in such a case, exempted a purchaser from seeing to the application of the purchase-money, had reference to the state of things at the death of the testator, and that if the debts were afterwards paid, leaving the legacies alone charged, that could not vary the rule."

FORBES
PEACOCK.

* * * * *

THE LORD CHANCELLOR:

[720]

In this case the testator charged his real estate with the payment of his debts, and directed it to be sold upon the death of his wife, if not sooner disposed of, and the proceeds, with the residue of his personal estate, to be divided among certain of his relations. The executors, being thus empowered to sell the real estate, the surviving executor entered into a contract for that purpose with the defendant.

Twenty-five years had elapsed since the testator's death, and the defendant by his solicitor enquired whether there were any debts due from the estate which remained unsatisfied, and if not, whether the cestuis que trust would give authority to sell. To this question no answer was returned.

[721]

The VICE-CHANCELLOR was of opinion that this, under the circumstances, amounted to notice to the purchaser that the debts were paid, and that he was therefore bound to see that the purchase-money was properly applied. It followed that the concurrence of the cestuis que trust was necessary to enable the purchaser to make a good title.

The question is, whether the opinion of the VICE-CHANCELLOR can be sustained.

The estate being charged in the first instance with the payment of debts, the defendant was not bound, according to the general rule, to see to the application of the purchase-money. If, indeed, he had notice that the vendor intended to commit a breach of trust and was selling the estate for that purpose, he would by purchasing under such circumstances be concurring in the breach of trust, and thereby become responsible: *Watkins v. Cheek* (1), *Eland v. Eland* (2).

But assuming that the facts relied upon in this case amount to notice that the debts had been paid, yet as the executor had authority to sell not only for the payment of debts, but also for the purpose of distribution among *the residuary legatees, this would not afford any inference that the executor was committing a

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(1) 25 B. R. 181 (2 Sim. & St. 199). (2) 48 R. B. 134 (4 My. & Cr. 429 ;
ubi supra).

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breach of trust in selling the estate, or that he was not performing what his duty required. The case then comes to this—if authority is given to sell for the payment of debts and legacies, and the purchaser knows that the debts are paid, is he bound to see to the application of the purchase-money? I apprehend not.

In the case of *Johnson v. Kennett*, where it was contended that the rule did not apply, because the debts had been paid before the sale took place, I held that the rule had reference to the death of the testator, and, therefore, that even supposing the debts were paid before the sale took place, and that the legacies alone remained as a charge, that circumstance would not vary the general rule (1).

[723]

The VICE-CHANCELLOR assents to the correctness of this opinion which was adopted by Lord LANGDALE in *Page v. Adams*, and sanctioned by Lord COTTENHAM in *Eland v. Eland*. I see no reason to depart from what I then stated, and as this case falls, I think, within the same rule, I must direct the judgment to be reversed.

1846.
Jan. 3.
Dec.

WHITWORTH v. GAUGAIN.

(1 Phillips, 728—736; S. C. 15 L. J. Ch. 433.)

Lord
COTTENHAM,
L.C.

[728]

[A NOTE of the judgment on this appeal, affirming the decision of WIGRAM, V.-C., will be found at the end of the report before the Vice-Chancellor. See 64 R. R., at p. 365.]

(1) If notwithstanding this decision it should still be inferred from the terms of the *dictum* in *Johnson v. Kennett*, that the rule would not apply to a case in which it should happen that there were no debts due at the testator's death, and that the purchaser knew it, I have the authority of Lord LYNDRHURST for stating that he did not intend on that occasion to lay down any rule which should govern such a case; and that the guarded and somewhat qualified terms in which the *dictum* is referred to and adopted in this case were used for the express purpose of excluding that inference.

Should it be held that the rule applies to a case of that description, it would seem to follow inevitably (if indeed it be not apparent from the current of existing authorities) that the rule is, as was contended by the counsel for the appellants in the prin-

cipal case, an absolute rule of construction, and not one depending for its application on the state of the testator's affairs, either at the time of his death or at any other period. Indeed it seems difficult to understand how it should ever have been considered otherwise. *Balfour v. Weland* is an instance in which an absolute power to give discharges for the purchase-money was implied, even in a deed, from the nature of the trusts to be performed. And in cases of the class now under consideration, the implication of a similar power amounts to nothing more than attributing to the mind of the testator a sense of that necessity for the trustees' having such a power where they are directed to pay debts, which the Courts have always acknowledged, where there have been debts to be paid.—Note by Reporter.

THE ATTORNEY-GENERAL *v.* THE EARL OF
STAMFORD (1).

(1 Phillips, 737—761; S. C. 10 L. J. Ch. 58; 12 L. J. Ch. 297; 4 Jur. 1102; 7 Jur. 359.)

By the statutes of a Free Grammar School founded at Manchester in the reign of Henry VIII., it was provided that a high master and usher should be appointed, with certain stipends payable out of the revenue of the charity, who were to teach freely and indifferently any male child who should come to the school from whatever county or shire without any money or other reward whatever, except only the said stipends—one of which scholars was to be appointed by the head master to teach the infant scholars (*infantes*) their A, B, C, primer and sorts till they began grammar. The surplus income of the charity, when it exceeded a certain sum, which was to be kept as a reserve, was to be applied in exhibitions for the scholars at the Universities of Oxford and Cambridge. Vacancies in the body of trustees, who were twelve in number, were to be filled up from among honest men of the parish of Manchester; and there was a power to the trustees for the time being to augment, expound, and reform all such of the original statutes as concerned the schoolmaster, usher, and scholars. The revenue of the charity having of late years greatly increased, and an information having been filed for a new scheme, it appeared that for upwards of a century past some of the trustees had been elected from adjacent parishes and counties; and that for a like period the two masters had been allowed to take boarders, who had participated indiscriminately with the other scholars in the exhibitions and other benefits of the charity. The trustees had also sanctioned a regulation, by which boys under six years of age, and unable to read, were excluded from the school.

By the decree of Lord Chancellor COTTENHAM, it was referred to the Master to settle a scheme with the following declarations. 1. That in future appointments of trustees regard was to be had to the qualifications required by the statutes. 2. That all boys who were of an age to be capable of receiving instruction were to be admitted. 3. That boarders were not in future to be eligible to exhibitions, or to derive any benefit from the funds of the charity in any manner by which the expenditure of such funds might be increased.

On a rehearing before Lord Chancellor Lyndhurst, it was held that there was no ground for excluding boarders from the benefit of the charity. The third declaration was accordingly struck out, and, in lieu of it, a reference directed to the Master to inquire on what conditions, and subject to what restrictions, the masters were to be allowed to receive boarders in their houses.

The *Attorney-General* ought to be a party to all inquiries before the Master, under the 52 Geo. III. c. 101 (Sir S. Romilly's Act), and any proceedings taken in his absence are irregular.

THIS was an information filed against the trustees of the Free Grammar School at Manchester, and against the head master and usher of the same, praying for an account and a reference to the Master of this Court to settle a scheme for the future management of the charity, having regard to its augmented revenues *and

(1) *Manchester School* case (1867) L. R. 2 Ch. 497, 36 L. J. Ch. 544, 16 L. T. 505.

1839.
Nov. 30.
Dec. 2, 3, 4, 5.
1840.
Nov. 10.
—
Lord
COTTENHAM,
L.C.
Rehearing.
1841.
Dec.
1842.
March.
—
Lord
LYNDHURST,
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[737]

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to the altered circumstances of the town, and for the appointment of new trustees in the room of some of the defendants, who were alleged not to be qualified for the office according to the provisions of the foundation deed.

By that deed, which was a deed of feoffment, bearing date in the 16 Henry VIII., after reciting that Hugh Oldham, late Bishop of Exeter, “for the good mind which he had and bore to the county of Lancaster, considering that bringing up children in learning and good manners was the means to have good people there, and that the liberal science and art of grammar was the ground and foundation of all other liberal arts or sciences, without which the others could not probably be had, for the science of grammar was the gate by which all others were known, in diversity of tongues and speeches; but that, from the great poverty of the common people there, as also for lack of schoolmasters and ushers, the children in the same county, having pregnant wit, had been, for the most part, brought up idly, and not in virtue, learning, education, and good manners,” he, the Lord Bishop, at his own costs and charges, had, within the said town, built a house adjoining to the College of Manchester, for a Free School, there to be kept for ever, and to be called the Manchester School; and had also, at his own expense, purchased other premises, which he had conveyed, together with the said school-house, to Hugh Bexwycke and Joan Bexwycke and their heirs, to be disposed and converted to, and for the continuance of, the teaching and learning to be had and taught in the same school: It was witnessed that the said Hugh and Joan gave and granted the said premises, and also divers others therein described, of which they were seised to their own use, to twelve persons therein named, and their heirs for ever, to the use and intent that they should

[*739] *perform, fulfil and observe all the Acts, ordinances, provisions and constitutions contained in the schedule thereto annexed.

By the regulations contained in the schedule, it was, amongst other things, provided that there should be a high master and an usher for the school, having sufficient literature and learning to teach children grammar after the form and manner then in use in the school of Banbury in Oxfordshire, or after such use and manner as should thereafter be ordained universally throughout the province of Canterbury: the high master and usher to be appointed by the said Hugh and Joan during their joint lives, and the life of the survivor, and after the death of the survivor, by the President for the time being of Corpus Christi College, Oxford, and in default

of appointment by him within one month after a vacancy, then by the Warden of the College of Manchester. That every school-master and usher should teach freely and indifferently every child and scholar coming to the school, without any money or other reward whatsoever, except only their stipends, which were to be 10*l.* a year for the high master, and 5*l.* a year for the usher. That the high master for the time being should always appoint one of his scholars, as he should think best, to instruct and teach, in one end of the school, all infants (*infantes*), that should come there to learn the A, B, C, primer and sorts till they began in grammar, such scholar to be changed every month. That no scholar or infant of whatever county or shire soever, being a male child, should be refused admission to the school, except he had some horrible contagious disease, or other infirmity, to be judged of by the Warden. That every scholar, at his first admission, should pay the sum of 1*d.* towards cleaning the school, and have his name entered in a book, which was, every *third year, to be delivered to the Warden, “to the intent that it should always appear who had been brought up in the school, and so they to have exhibitions to Oxford and Cambridge as after provided.” The surplus revenue of the charity property, after paying the stipends of the masters, and the other necessary outgoings, was to be accumulated until it reached the sum of 20*l.*, after which the annual surplus was to be given “to the exhibitions of scholars yearly at Oxford and Cambridge, who had been taught in the school, by the discretion of the Warden and the high master for the time being; but so that no scholar should have yearly above 26*s.* 8*d.*, and that till such time as he should have some promotion by fellowship of some College or Hall, or other exhibition, to the amount of seven marks.” It was also provided that future vacancies in the number of the trustees should be filled up “from among honest gentlemen and honest persons of the parish of Manchester” (1). Lastly, it was provided that, “inasmuch as in time to come many things might survive and grow by sundry occasions and causes, which, at the making of these Acts and ordinances, was not possible to call to mind, the trustees, from time to time, when need should require, calling to themselves discreet learned counsel, and men of good literature, should have full power and authority to augment, expound, and reform all such of the said Acts and ordinances only concerning the schoolmaster,

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(1) Some of the original trustees scribed as resident in other parishes named in the deed were therein de- and counties.

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usher, and scholars, for their and every of their offices concerning the said school for ever."

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The charity estates having in the course of the last century greatly improved in value, additions were from time to time made to the salaries of the masters; and two assistant masters were appointed with salaries; and *twelve exhibitions, of 60*l.* each, were founded: notwithstanding which additional outgoings there remained, of late years, a considerable surplus income, which was invested and suffered to accumulate.

In the year 1832, the accumulations then amounting to about 120,000*l.* in the 3 per Cents., the trustees obtained an order upon a petition presented under Sir Samuel Romilly's Act, by which it was referred to the Master to settle a new scheme for the management of the school, and to inquire whether it would be for the benefit of the charity that any and what addition should be made to its establishment, and, in case any surplus income should remain after providing for instruction in the learned languages, in what manner such surplus should be applied, and whether it would be proper that the school buildings, which were then old and dilapidated, should be rebuilt or repaired, and whether any and what additions should be made thereto.

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When that order was obtained the condition of the school and of the charity was this: The school-house, which was built in 1776 on the site of that mentioned in the foundation deed, consisted of two rooms, the one called the Upper School, in which instructions were given by the high master, usher, and their two assistants in the learned languages; and the other, called the Lower School, to which any boys of six years old and upwards were admitted who could read English, and where they were instructed by another master in English reading and the rudiments of Latin, until they acquired sufficient proficiency to take their place in the Upper School; the scholars both of the Upper and Lower Schools having the opportunity of receiving instruction in writing, arithmetic, and mathematics, but not gratuitously, such instruction not having been considered to be within the sphere *of studies at a Grammar School. The high master, the usher, and the assistant masters, whose salaries from the charity were respectively 500*l.*, 250*l.*, 170*l.*, and 135*l.*, had all for many years been permitted by the trustees to take boarders in their houses, who were instructed along with the other scholars, the whole number of scholars of both kinds being about 200. The gross revenue of the charity estates and

property was about 4,500*l.*, including the dividends of the stock ; and the average surplus for the last three years, after paying the salaries of the masters, the exhibitions, of which there were twelve of 60*l.* a year each, and other outgoings, was about 2,800*l.*

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The scheme which, under these circumstances, was adopted by the Master, and subsequently confirmed by the Court, made provision out of the surplus income of the charity for gratuitous instruction in writing, arithmetic, mathematics, natural philosophy, and modern languages ; and also for the gradual formation of a library, and a collection of scientific instruments for the use of the school : and a sum not exceeding 10,000*l.* was allowed out of the accumulated fund for rebuilding the high master's house and the school-house, with such additional rooms as might be required for carrying into effect the more extended system of education then proposed. Sanction was also given to the continuance of the practice, of the high master and usher and their assistants taking a limited number of boarders in their respective houses. And it was provided that all boys of the age of six years and upwards should be eligible to become scholars, and should be allowed to remain at the school up to the age of twenty. The salaries of the high master, usher, and assistants were slightly increased, provision was made for the awarding of premiums to the scholars for proficiency and good conduct in the school, and the exhibitions were continued at their actual number *and amount ; with certain regulations respecting the annual examination of candidates for them, with a view to secure impartiality in the election ; both the premiums and the exhibitions being open alike to boarders as well as free scholars.

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The present information was filed, on the relation of several residents within the parish of Manchester, about two years after the Master's report had been confirmed, and when the high master's house was nearly completed. The ground on which it sought to disturb the scheme so recently sanctioned by the Court was, that the proceedings which had resulted therein had been conducted in the absence of the *Attorney-General*, who, as it appeared from the Master's report, had not been represented before him ; so that the whole matter had been left in the hands of the trustees, several of whom were noblemen and country gentlemen not resident in the town or parish of Manchester, and, for that reason, as the information submitted, not only imperfectly acquainted with the circumstances and wants of the inhabitants, but absolutely disqualified for the office of trustee.

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With respect to the merits of the scheme, the information charged that it was neither suited to the wants and character of the inhabitants of Manchester, who were for the most part engaged in mercantile pursuits, nor consistent with the expressed object and design of the founders: that what was intended to be a Free Grammar School for the daily instruction in useful learning of the sons of the inhabitants of Manchester and its vicinity, of all ranks and classes, had been converted into a scholastic establishment resembling the great public schools in which the system of education was adapted almost exclusively to the wealthier classes: that the practice of taking boarders who paid for their *education was a breach of the regulation which forbade the master to take any payment or gratuity from the scholars, and that, at all events, boarders were not entitled to enjoy the exhibitions or other benefits of the charity, although, in fact, they had enjoyed them in a much greater proportion than the free scholars: that the sum allowed for rebuilding the high master's house was excessive, inasmuch as, but for the practice of taking boarders, a much smaller house would have sufficed. It further charged that children under six years of age, or who were unable to read, ought not to be excluded from the school, but that, on the contrary, provision ought to be made for the instruction of very young boys in the elements of reading by means of alphabetical classes, or infant schools, for teaching them their letters in the manner directed by the foundation deed; and that, having regard to the terms of that instrument, and to the extent and populousness of the district for whose benefit the charity was principally intended, it would be proper out of its surplus revenues to endow several schools of that description in different parts of the town.

The trustees and the masters, in their answers, relied on long usage, as well as on the construction of the deed, in justification both of the practice of appointing non-residents, as trustees, and of that of taking boarders; adding that the payments made by that class of scholars were made exclusively for their board, and not in any respect for instruction. They also insisted that the proceedings on the petition had been regular, and that this information, so far as it sought to disturb the existing scheme, was irregular. With reference to the proposed system of elementary instruction, they contended that no elementary instruction was within the scope of the charity which was not immediately connected with a classical education.

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The information came on to be heard before Lord Cottenham.

Mr. Wigram, Mr. Anderdon and Mr. Mylne appeared for the
Attorney-General.

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Sir Charles Wetherell, Mr. Jacob, and Mr. Bagshawe for the
trustees.

Mr. Russell for the two masters.

THE LORD CHANCELLOR (COTTENHAM):

I consider this case as one of very great importance, as it relates to the due application of very large funds to the objects of education in so populous and important a town as Manchester.

I find this school specially excepted from the application of the Act of last Session (1), which extends the powers hitherto exercised by this Court in cases of grammar schools; but, fortunately, there are in this case circumstances and peculiarities which prevent that exception from being so injurious to the town as it otherwise might have been. It is impossible to look at the instrument upon which the establishment of this school is founded, without being satisfied that it was intended to be what is technically called a Grammar School; but there is, fortunately, in these instruments sufficient to relieve it from the operation of those decisions in which this Court has, I think unnecessarily, confined the meaning of that term within the narrowest limits. Later cases, however, have departed from the strictness of those decisions; and in cases in which part of the founder's property has become disposable, from the *whole of his objects being satisfied with part of it, the Court seems to have lost sight of the doctrine of *cy-près*, under which it familiarly administers the whole or part of his property, which has become disposable from his objects having failed.

1839.
Nov. 30.
Dec. 2, 3, 4, 5.
1840.
Nov. 10.
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The founders of this charity have made provisions which prove that they considered, what might perhaps have been assumed in some other cases, that there was nothing inconsistent with the object of teaching the learned languages, in giving such preliminary instructions as are necessary to the acquiring a knowledge of those languages.

The statutes of 16 Henry VIII. provide for the teaching "of all infants that shall come to the school there, A, B, C, primer and sorts till they be in grammar;" and they also most wisely provide "because in time to come many things may and shall survive and grow by sundry occasions and causes, which, at the making

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of these Acts and ordinances, was not possible to call to mind, that the feoffees should thereafter, from time to time, when need should require, calling to them discreet learned counsel, and men of good literature, have full power and authority to augment, increase, expound, and reform all the said Acts, ordinances, articles, compositions, and agreements only concerning the schoolmaster, ushers, and the scholars for their and every of their offices concerning the said free school for ever." This power and duty so wisely given this Court may exercise without trespassing upon the doctrine of any of the cases.

[*747] These provisions of the statutes, together with the course which has been followed in this charity, and the scheme sanctioned by this Court in 1833, of which no *complaint has been made as being too extensive, and which the defendants indeed insist ought to be held conclusive and binding, relieve me from the necessity of reviewing the doctrine of some of those authorities in this case. And the beneficial provisions of the Act of last Session will probably render it unnecessary in any other.

What I have to consider is, whether there have been made out upon this information sufficient grounds for this Court to decree all or any of the subjects of relief asked at the Bar, viz., 1. To have the accounts taken; 2. To remove the existing trustees; 3. To send a reference to the Master to approve of a new scheme for the application of the income of the charity property.

I am of opinion that no case has been made for a decree to take the accounts. The statutes prescribe the mode in which the receiver's accounts are to be settled, and there is no allegation or proof in support of a case of neglect or error in the performance of that duty. In the absence of such proof I must assume that the parties to whom this duty is assigned, have faithfully performed it. To decree an account under such circumstances would be to expose every charity estate to the expense of a suit whenever any person should for any reason ask for an account in the form of an information.

I am also of opinion that upon the second head I cannot make the decree prayed for. It is true that the statutes direct that the feoffees "to be in future appointed" should be "honest gentlemen and honest persons of the parish of Manchester." This direction does not appear to have been followed: but the custom appears to have been to appoint the most eminent and distinguished persons in the neighbourhood to the office of feoffees and trustees;

and the charity and the public are much indebted to those who have undertaken *those offices and contributed by their influence to support the efficiency of the charity. Of this description are the present trustees, and of their conduct as such feoffees and trustees no cause of complaint has been established; and I should much have regretted if I had found myself compelled, from any objection to their qualification, to remove them from those offices, feeling that by so doing I should, in all probability, be doing a real injury to the charity.

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In *Attorney-General v. Clarendon* (1), it is evident from the observation of Sir W. GRANT, although the case before him was that of a corporation, that he would not have thought it incumbent upon the Court in such a case as this to inquire into the eligibility of the trustees. The question, however, is very different where the Court has to prescribe the course to be pursued for the future. The provision of the statutes is distinct upon this subject, and I think it is founded upon good sense; for, however advantageous it may be that the charity should have the protection of the powerful and eminent aristocracy of the county and neighbourhood, there can be no doubt that trustees residing within the parish and personally interested in the welfare of the inhabitants of the town would probably give a more regular and vigilant superintendence to the establishment: perhaps a compound of the two would be the most desirable. But, however that may be, I find a rule laid down by the statutes from which I do not find any reason for departing; but, on the contrary, although at the date of the statutes there may have been some difficulty in finding proper persons to fill these offices within the parish, it is certain that the only difficulty now will be in the selection from amongst the *many who possess all the qualifications that can be desired.

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The most important subject of the plan for the future management of the charity remains to be considered; and here the only difficulty exists in the former proceedings in 1833. On the part of the defendants it was contended that these proceedings ought to be treated as conclusive and as excluding all investigation under the present information, whilst, on the part of the *Attorney-General* (for I cannot for this purpose consider the relators as parties to the litigation), it was insisted that these proceedings were to be altogether disregarded as *ex parte*. I cannot adopt altogether either of these propositions. That the proceeding was *ex parte* there can be

(1) 17 Ves. 499.

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no doubt. The order, the report, and the affidavits upon which the Master made his report clearly prove it. The *Attorney-General* does not appear to have been a party to the proceedings in the Master's office, which itself, in my opinion, deprives them of the value which would otherwise attach to them. Sir J. LEACH held that the *Attorney-General* ought always to be a party to the inquiries under such references. I had hoped that such had since that time been the universal course, and I trust it will be so for the future. If under Sir S. Romilly's Act any party may *ex parte* obtain the Master's sanction to any scheme he may propose, and the order confirming the report is to preclude future investigation, that Act will produce much more mischief than, if properly acted upon, it is calculated to do good. The order upon petitions under that Act cannot be obtained without the sanction of the *Attorney-General*. The law, therefore, requires that he should be a party to the representation to the Court that a grievance exists which the interests of the public require should be redressed: but if he is not to intervene in the inquiry as *to the particulars of such grievance, or in the consideration of the proper remedy to be applied, if such inquiry and consideration is to be left to the conduct of parties who may have private interests to promote, not only will no protection be afforded to the public interests, but the apparent sanction of this Court will in many cases be obtained to pre-existing or newly-conceived abuses. If I find that it is the practice in any of the Masters' offices to proceed upon these references in the absence of the *Attorney-General*, it will be necessary to make a general order to correct such practice. Some cases were referred to in which the provisions of the Act, as to appeals from orders made under it, were discussed. Such cases have no application to an information by the *Attorney-General*, complaining of a scheme adopted upon a report under this Act in his absence.

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But, although I am of opinion that such proceedings cannot be a bar to any well-founded complaint by the *Attorney-General* on behalf of the public, I do not think it necessary, because I do not think it would be just, or for the interest of the public, that such proceedings should be treated altogether as a nullity. Much money has been expended, and many new interests may have been created under the directions of the order of 1833. These parties, and these interests, the Court is bound, as far as possible, to protect; and although I find in the scheme so adopted by the Court much to object to, yet I find in it much of which I fully approve. The

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course, therefore, which, I think, this Court ought now to follow, is to adopt so much of that scheme as is worthy of being maintained, and to correct so much of it as now appears open to objection; and the proper way of effecting that object will, I think, be to send it to the Master with certain directions, some of which will be for the purpose of giving to the *Attorney-General* an *opportunity of bringing forward such suggestions as the interests of the public in this charity may appear to require, but others of which, applied to subjects now ready for decision, will be declarations of the opinion of the Court upon those points.

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Of these, the most important is that of boarders in the houses of the head and other masters. There have been many cases in which this has been discussed and allowed by the Court—whether wisely or not may, as to some of them, be questioned; but there is no doubt as to the principle upon which the Court has in all of them acted, and which alone could have justified the permission granted. In all the cases, the object of the foundation, and the purposes of the trusts to be performed, being the gratuitous education of the objects of the charity, the Court would not have been justified in granting this permission to the masters, except upon the conviction that the purposes of the charity would not be prejudiced by the exercise of the liberty given. In some it has been thought that the purposes of the charity were likely to be advanced by it; as, when the funds of the charity were very small, it has been supposed that, by opening this additional source of revenue to the master, persons might be induced to accept the office who would have declined to perform the duties for the small salaries which the funds of the charity could afford. Such cases can have no application to the present, in which the income in 1833 was 4,550*l.*, and the salary awarded to the head master was 600*l.* per annum; and the salaries of all the masters together were 2,050*l.*, whilst the number of boys, including boarders, was 198. It is, I think, impossible upon any principle, or upon any authority, to justify that part of the scheme approved in 1833, which relates to this subject. I find an expenditure of 10,000*l.* of the charity funds sanctioned, of which a considerable part would *not have been required for the purposes of the charity, or for any purpose but the accommodation of the boarders in the master's house. If there were not special circumstances in the case of *Rugby School*, as stated by Sir W. GRANT in the case of *Harrow School* (1), I can

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(1) 17 Ves. 505.

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only say that I cannot understand upon what principle Lord ELDON got over the, in my opinion, well founded objections of the Master to the expenditure proposed ; nor can I reconcile what is stated to have been done in that case with the principles laid down and acted upon by the same learned Judge in *Attorney-General v. Coopers' Company* (1). Of the sum so to be expended, 4,450*l.* was for rebuilding the master's house, which was to contain accommodation for twenty boarders, including various rooms exclusively for their use. Unfortunately this money has been expended, the buildings have been erected, and I am to say what shall be the future rule upon this subject in the application of the funds of a charity of which part is now invested in the buildings so adapted for these purposes. It appears, also, that the permission to the masters to take boarders has long existed, and no doubt those who at present exercise the duties of masters accepted those offices in the expectation that such permission would be continued for the future. I am anxious, as far as possible, consistently with the interests of the charity, not to disappoint expectations so naturally excited, or to do any injury to the interests of these gentlemen ; but I am, in the first instance, and in preference to all other considerations, bound to guard the interest of the charity from injury, and its funds from misapplication.

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Any provisions, therefore, of the scheme adopted in 1833, that may possibly have the effect of applying, in future, part of the funds of the charity for the benefit of *the boarders in the house of the master, which can now be corrected, must be altered ; and I find several of that description. The boys so boarded in the master's house cannot be considered as in any respect objects of the charity. From the scholars of the charity, the masters are by the statutes prohibited from taking any payment, or any reward, beyond their stipend. The boarders cannot be considered as scholars of the charity for the purpose of participating in its funds, without submitting to all the provisions required by the statutes ; and yet I find, by the scheme of 1833, that the funds of the charity are applied not only in providing premiums for such boarders as well as the free scholars, but that they are also made eligible for exhibitions. The result appears to have been what might have been expected. Of twelve exhibitions, from 1833 to 1836, both inclusive, eight have been given to boarders and four to day scholars, and from 1807 to 1836, fifty-seven to boarders and twenty-eight to

(1) 12 R. R. 162 (19 Ves. 191, 194).

day scholars. It was observed that the head master and the feoffees appoint the two examiners, and that the head master and the warden select from among the boys reported to be qualified, those to whom exhibitions are given. I will not suppose that there has been any partiality in the selection, but the giving premiums and exhibitions to the boarders is not only a misapplication of the charity funds, but the day scholars have not even a fair chance in the competition with strangers for the prizes intended exclusively for themselves. The superior advantages of the boarders, from the constant and comparatively exclusive attention of the masters, must give them acquirements superior to those of the poor day boys.

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These misapplications of the charity funds in favour of the boarders are so obvious that I propose making them the subject of a declaration in the decree. But there may be many others. If, for instance, the various *masters now appointed receive out of the charity funds larger payments than they would require if their instructions were confined to the day boys, the excess is a misapplication of the charity funds. This, and any similar cases, must be the subject of inquiry before the Master. I also think that that part of the scheme which excludes from the school all children under six years of age, is inconsistent with the statutes which, in providing for the teaching of all infants who should come to the school to learn their A, B, C, and primer, clearly intended that the doors should be open to all children capable of any instruction. I must also observe that the statutes point out the proper application of any surplus of the charity income, namely, in exhibitions to scholars who had been brought up at the school ; but the scheme of 1838, although it had to dispose of a surplus of 2,000*l.* per annum, made no addition to the twelve previously existing exhibitions of 60*l.* each.

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Having felt called upon to make these observations upon some of the provisions of the scheme, I am happy in expressing my approbation of the general spirit of the system of instruction proposed. The object of the provisions, in this respect, is to preserve the integrity of the establishment as a grammar school, but to introduce all such other branches of instruction as may be useful to those who seek the benefit of the founder's bounty ; and, as the funds are ample for that purpose, the object ought to be so to apply them as to afford to the inhabitants of Manchester the means of gratuitous instruction for their children in all branches of learning

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and information which may be most likely to be beneficial to them, and such I conceive to be the object of the scheme adopted in 1833, and to which, in that respect, no well-founded objection has, I think, been made; but the *Attorney-General* ought not, I think, to *be precluded from offering any suggestions for its improvement.

I propose, therefore, to declare, that in all future appointments of feoffees and trustees, regard should be had to the qualifications required by the statutes; that all children of an age to be capable of instruction are entitled to be admitted into the school; that no part of the funds of the charity are hereafter to be applied towards paying premiums or exhibitions to boys who are, or have been, boarders in the houses of any of the masters, except in continuing to pay exhibitions already granted; and that such boarders are not in future to derive any benefit from the funds of the charity in any manner by which the expenditure of such funds may be increased. And with these declarations refer it to the Master to approve of such alterations in the scheme contained in the Master's report of 1833 as may be necessary to carry the same into effect, and as the Master shall find to be proper for the purpose of more effectually carrying into effect the object of the charity, regard being had to the present amount and particulars of the property of such charity, and the existing circumstances of the town and neighbourhood of Manchester.

1841.
Dec.

The decree having been drawn up in conformity with that judgment, the trustees presented a petition of rehearing, and the cause now came on to be reheard before Lord Chancellor Lyndhurst.

Mr. Bethell and *Mr. Mylne* appeared for the *Attorney-General*.

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Sir Charles Wetherell and *Mr. Bagshawe* for the trustees.

Mr. Russell for the two masters.

The argument on this occasion was directed chiefly to the following points:

1. The jurisdiction of the Court, in this proceeding, to vary the scheme settled upon the petition of 1833.

2. The eligibility of persons, as trustees, who were not resident within the parish.

3. The age at which scholars were to be admissible.

4. The right of boarders, if admitted at all, to participate in the benefit of the charity, and particularly in the exhibitions.

5. The enlargement of the system of education as suggested in the information.

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THE LORD CHANCELLOR (LYNDHURST), after stating the grounds of his judgment on the first three points, in which he concurred with the decision of Lord COTTENHAM, proceeded as follows :

1842.
March (1).

The remaining, and certainly, as Lord COTTENHAM stated, by far the most important, consideration with reference to the welfare of the school, is that which relates to the boarders. The practice of taking boarders is allowed after some hesitation by the Court. Neither party quarrels with that part of the decree, and therefore I am not called upon to inquire into it ; but there *is this restriction imposed, and it appears to me to be a most important one, and requiring very serious attention, and much caution, that the boys who are received into the houses of the masters as boarders are not to be allowed to share in the exhibitions and premiums with the other scholars. Now, the first thing that strikes me is this, that one very great object in sending boys from a distance to be educated in this school, and to become boarders with the masters, must be the advantage of these exhibitions at the Universities ; and I cannot help thinking that it is—I will not say altogether, but almost—nugatory to allow the masters the privilege of taking boarders, and to refuse to those boarders the privilege of sharing in the exhibitions. I think it would defeat the very object of taking boarders, and that it was almost useless to allow that practice to be continued if this restriction is to be acted on.

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In the decree it is provided that this restriction shall not operate upon exhibitions which have already been granted ; and one reason why the practice of taking boarders is allowed to be continued is, that it would be unjust to parties who have accepted their office upon an understanding that this privilege was to be continued, to take away such privilege. But that consideration applies equally to the boys who are now in the school. By the decree of Lord COTTENHAM, exhibitions already granted are to be continued. No doubt there are in the school many boys in the situation of boarders, who have gone thither with a view to these exhibitions, who have resided for some years there, and who cannot be transferred

(1) The date given in the *Law Journal and Jurist* is April 6, 1843: See 12 L. J. Ch. 297, 300; 7 *Jurist* 359.

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with advantage to other schools ; and upon the same principle, therefore, upon which boarders are allowed to be taken,—upon the same principle that it would be unjust to *disappoint the expectations of those persons who have accepted their offices with a view to this system,—it would be also unjust to those boys who have entered the school with a view to these advantages to deprive them of the benefits which led to their being placed in this establishment.

It seems in the argument to have been considered that the boarders could not be regarded as objects of the charity, because they paid money to the respective masters, contrary to the prohibition in the instrument of foundation. It appears doubtful, upon the fact, whether this was paid with respect to any of the matters that were the subject of instruction in the school. But, without relying upon this, these payments are authorised by the Court, which follows from the sanction to the establishment of boarders ; and it cannot be said to be inconsistent with the rules of the foundation ; the feoffees, and, of course, the Court being authorised by an express clause at any time to alter the rules.

As the school, therefore, was, by the deed of foundation, open to boys from all counties, and who would, of course, be entitled, as members of the school, to share in the exhibitions, I do not perceive how a payment to the master, under the sanction of the Court, can justly deprive them of this right. And the same observation applies equally to the antecedent period ; since these payments were during more than a hundred years made with the knowledge and, of course, under the sanction of the feoffees, who, as I before stated, had a power under the deed to make any variation in this respect in the original regulations.

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I cannot, therefore, help coming to the conclusion, that the boarders are objects of the charity, and, therefore, entitled to share in the exhibitions and premiums.

If I thought, on looking at the evidence, that this led to any abuse ; if there was anything to satisfy me that the boarders in the houses of the masters were considered with any peculiar favour in the elections for these exhibitions and premiums, I should then consider it the duty of the Court to interpose. But, from the manner in which the elections are conducted, and adverting to the evidence, with one single exception to which I shall presently direct my attention, there does not appear to me to be any ground for suspecting that in the choice that is made from the whole body of scholars who are candidates for these exhibitions, any partiality

is shown towards those who are boarders in the houses of the masters. It is true that, if you look to the number of boys who have received exhibitions, the proportion of boarders is much larger than of day scholars; and it is inferred, from that circumstance, that some abuse exists in the selection. But it appears to me, that that observation is altogether inconclusive, for many reasons. Undoubtedly the proportion is much larger, and any body who reflected upon it beforehand would be satisfied that it must be so, for reasons which are quite obvious. In the first place, boys coming from a distance would in all probability be better prepared, because they are sent generally with a view to the Universities and the learned professions: and earlier in life, therefore, their attention would be directed to subjects which are principally cultivated in schools of this description. In the next place, boys who are intended for the learned professions would stay longer at the school, and for that reason would be much better prepared to be candidates for the exhibitions. In the third place, it is obvious *that, in a town like Manchester, the great majority of persons would send their sons to this school, with a view to their obtaining such general education as might fit them for being afterwards employed in trade, manufactures, and commerce, and without any idea of sending them to the Universities. No doubt a large proportion of the scholars enter the school without any such object. It is, therefore, clear that you cannot, at the first view, come to any conclusion whatever from the number of exhibitions given to boarders being greater in proportion than the number given to day scholars.

Still, however, the question is one of so much importance, that I do not think I ought to decide it at once upon the information already before me. I propose, therefore, at present, to omit that part of the declaration in the decree which relates to exhibitions, and to refer it to the Master to inquire under what restrictions, and subject to what limitations, the high master and under-master should be allowed to receive boarders in their houses. By that means I shall be enabled, when the cause comes back, to decide whether it is proper to impose any such restriction, as that which my learned predecessor has in the first instance imposed, with respect to this part of the case.

There are many persons who seem disposed to consider that, in a place like Manchester, the character of this school ought to be entirely changed, and that it ought to be devoted exclusively to commercial purposes. I should very much lament such a change,

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because the tendency of different pursuits is to form men into classes, and it is, therefore, I think, of the utmost importance, for the purpose of obviating that great inconvenience, that we should, as far as possible, all of us be brought up according to one general system of education ; and *no system of education is better for the purposes of refining and humanizing the manners of a nation than a system of literature founded upon classical learning.

There is another consideration, also, connected with these establishments, that they are the avenues by which the humbler classes, by industry, activity, and intelligence, can force their way into the highest situations of the State ; and by furnishing the means of uniting at an early age the upper and lower classes, they tend to bind together by the strongest ties the whole system of society. For this reason I should regret any substantial change being made in the system upon which this institution is at present conducted.

Therefore the only alteration that I shall make, and which I consider absolutely necessary to make in this instance, is, to omit for the present, at least, the declaration relative to exhibitions, and to direct such reference to the Master upon that subject as I have mentioned.



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LANGDALE,
M.R.

On Appeal.
March 11.

Lord
COTTENHAM,
L.C.

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ATTORNEY-GENERAL v. BOVILL AND OTHERS.

(1 Phillips, 762—770 ; S. C. nom. *Att.-Gen. v. Bovill*, 4 Jur. 548.)

A decree, containing a declaration as to the proper mode of applying the income of a charity estate with reference to the founder's deed, need not be reheard, in order to enable the Court, on the hearing of a subsequent information, to make a different prospective declaration in reference to the same question.

Observations on the doctrine of limiting the participants in a fund devoted to the poor of a parish, to those who are not in receipt of parochial relief.

A sounder rule is to administer the charity according to the ordinary rule, and leave to chance to what extent it may operate to the relief of the poor rate.

The order of reference to approve of a scheme, in such a case, contained a special authority to the Master to include provisions for educating, clothing, and apprenticing the children of the poor, advancing sums by way of loan, &c.

Sketch of scheme pursuant to that order.

By an indenture of feoffment, dated the 28th of February, 1552, William Breton, in consideration of 160*l.* paid to him by the churchwardens of the parish of St. Clement Danes, enfeoffed and confirmed unto and to the use of John Browne and eleven other parishioners and inhabitants of the said parish, and their heirs,

his twelve messuages with the appurtenances, and his close and void piece of ground with the appurtenances, and his cottage and tenement, called the Slaughter-house, situate near the said twelve messuages, to the intent that they should yearly “pay the same” to the churchwardens of the said parish for the time being, to be distributed in alms by the churchwardens amongst twelve poor people in the said parish for the time being abiding and inhabiting, and who within the same parish by the space of twelve years had been abiding and inhabiting in honest fame and opinion, every week or every month, as it should seem best in that behalf, by the discretion, consent, and oversight of *twelve honest, good, and discreet parishioners, who had formerly borne the office of churchwarden of the said parish, and by the consent of the greater number of them : and to the intent that whenever all the said feoffees but four or three should be dead, the survivors, at the request of the churchwardens, or of twelve parishioners having formerly filled the office of churchwarden, should make a like feoffment of the trust premises to twelve or ten other persons, good, honest, and discreet parishioners, to hold to them and their heirs to the same intents and purposes, and with the like clauses in the same deed to be contained, as were specified and contained in the now stating indenture.

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For some time after the founding of the charity the income of it was not more than sufficient for the relief of twelve poor persons ; but in the course of the seventeenth century, both the number of the poor in the parish and the income of the charity estate having greatly increased, certain almshouses were erected out of the funds for twelve poor women, and the benefit of the charity was extended to the poor of the parish at large.

By a decree of the Commissioners of Charitable Uses, dated the 7th of February, 1701, after reciting that the Commissioners were fully satisfied that the true meaning of the deed of feoffment was, that the whole of the rents and profits should be laid out and disposed of amongst the poor of the parish, and to no other use whatever, it was decreed, to the intent that all future misapplications might be prevented, and that the charity revenues might be rightly applied for the poor of the parish, and that the number of poor to be relieved therewith might from twelve be enlarged to as many as the rents and profits would annually relieve, that the *trustees for the time being should pay the rents and profits to the churchwardens of the parish, to be distributed in alms every week or

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every month to and amongst such poor people, of honest fame and opinion and who had resided twelve years in the parish, as by the said trustees, and ten or twelve other of the most substantial inhabitants should be appointed to receive the same, and that the churchwardens should yearly or oftener account to the trustees, as therein mentioned, for their receipts and disbursements in respect of such charity.

Between the date of that decree and the year 1814 several deeds were executed for the appointment of new trustees, by some or one of which deeds certain trusts were declared at variance with the terms of the original deed of feoffment, it being by such trusts directed that, after providing for the support of the almswomen, the trustees should account for and pay over the residue of the income to the parish vestry, to be applied to the public use and benefit of the parish, either in repairing the church, or in such other uses as occasion might require.

In the year 1814, there being a sum of about 8,000*l.* in the hands of the trustees, arising from accumulations of the rents of the estate, part of which it was proposed to apply to the repair of the parish church, an information was filed by the *Attorney-General* at the relation of certain of the parishioners for the purpose of obtaining the sanction of the Court to such appropriation. That information came on to be heard before Sir William Grant, M. R., when a decree was made, dated the 6th February, 1816, by which it was declared that the rents of the estate ought to be laid out and disposed of amongst the poor of the parish, and to no other use, according to the decree of the Commissioners *of Charitable Uses, dated the 7th February, 1701, and that the trusts contained in the last mentioned deeds, being contrary to that decree, were therefore null and void; and it was ordered that, after paying to the churchwardens as much of the rents and profits of the estate as should be sufficient for the support of the twelve almswomen, and for keeping the almshouses in repair, the trustees should pay the surplus of such rents to the overseers of the poor of the parish, to be by them applied to the use of the poor of the said parish: and, after providing for the payment of the costs of the suit out of certain sums of stock which were standing to the credit of the cause, amounting to about 10,000*l.*, it was ordered, “by consent,” that a sum of 4,000*l.*, part thereof, should be paid to the then churchwardens, to be by them applied in discharge of the necessary expenses of repairing the church, excepting the chancel. And it

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was ordered that the residue of the said sums of stock should be paid to the overseers of the poor of the parish, or any two of them, to be by them applied for the relief of the poor of the parish.

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From the date of that decree the sum of 1,000*l.* out of a gross revenue of about 3,500*l.* was yearly applied in support of the almshouses, and the rest was paid to the overseers of the poor, by whom it was carried to the general account of the poor rate.

In the year 1837 this information was filed on the certificate of the Charity Commissioners, against the churchwardens and the overseers of the parish, insisting that such application of the sums so paid to the overseers was at variance not only with the trusts of the deed of feoffment, but with the true intent and meaning of the decree of 1816, being, in effect, an appropriation of the funds, not for the benefit of the *poor, but for the relief of those who were liable to the poor rate; and praying that such abuse might be corrected, and that a scheme might be settled for the future management of the charity, and for the distribution of the income among the poor of the parish. The information related also to other charities in the same parish, which had been similarly dealt with.

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On the hearing of the cause before the MASTER OF THE ROLLS, his Lordship dismissed the information as to the property comprised in the decree of the 6th February, 1816, considering himself precluded, by the terms of that decree, from giving directions as to the application of the income of that property.

Against that part of the decree the *Attorney-General* appealed. The appeal came on to be heard before Lord Chancellor Cottenham.

Mr. Richards and *Mr. Blunt*, for the *Attorney-General*.

Mr. Wigram and *Mr. Sharpe* for the defendants.

The first question was, whether the Court could direct a scheme, or otherwise interfere with the present mode of administering the charity, without rehearing the decree of 1816, it being contended, on the part of the respondents, that the application of the funds now complained of was in conformity with that decree.

Upon that question,

THE LORD CHANCELLOR said:

I cannot concur in the opinion that I am precluded by the decree of 1816 from doing anything that may now be proper to be done for the due regulation of this charity. And I am

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*also of opinion that that decree, even if I were bound by it, does not contain any thing which would preclude me, because when I find the MASTER OF THE ROLLS in 1816 declaring that the rights of those who were entitled to the benefit of the charity were to be regulated by the decree of 1701, and afterwards directing the surplus to be paid to the overseers, I must consider his intention to have been that it was to be so paid for the purpose of being applied according to the right which was previously declared. The reason for transferring the distribution from the churchwardens to the overseers was probably that the churchwardens had abused the trust. The difficulty is that which has occurred in other cases, how to regulate the application of the money so as not to relieve the poor rates. I think there must be a scheme.

A question then arose whether any, and what, declaration should now be made for the guidance of the Master in settling the scheme ; it being contended, on the part of the *Attorney-General*, that the matter should go to the Master unfettered by any declaration except that which had been sanctioned by previous decisions of the Court in other cases, viz. that the benefit of the charity should be confined to those inhabitants of the parish who should not be receiving parochial relief ; and it was also suggested that the condition of twelve years' residence in the parish should be adhered to, inasmuch as, although not required by the decree of 1701, it might be a means of preventing the mischief, *which might otherwise arise, of poor persons coming to settle in the parish for the sole purpose of enjoying the charity.

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In the course of the discussion,

THE LORD CHANCELLOR said :

I am a good deal fettered by the decisions which have taken place with respect to persons receiving parochial relief not being proper objects. If I had not those decisions to contend with, it appears to me, with respect to this particular case, that the course would be to select proper objects of this charity without regard to whether it would operate to the relief of the poor rates or not ; for, either directly or indirectly, it must so operate, in whatever manner the funds may be applied. I am inclined to think that the right course is between the two that have been suggested—not to make the poor rate the fund to receive, but to administer the charity, and to leave to chance to what extent it may operate to the relief of the poor rates.

As to the twelve years' residence, it is, no doubt, one of the conditions in the deed of 1552, but it is not in the decree of 1701; and it does not appear to me that there is any reason why I should be anxious to restore that.

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By the decree ultimately made, it was declared that no part of the income of the charity was applicable or ought to be carried, to the account of the poor rates of the parish; and it was referred to the Master to approve of and settle a proper scheme for the application and distribution of the income of the charity, regard being had to the indenture of the 28th February, *1552, and to the decree of the 7th February, 1701, and to the declaration aforesaid; and, in settling such scheme, he was to be at liberty to include therein, if he should see fit, a provision for the education of the children of the poor residing in the said parish, either by aiding the existing schools of the said parish, or by the establishment of new schools there, or for both such purposes, and for the clothing and apprenticeship of such number of the children of the poor residing in the said parish as he might think right; and also a provision for the distribution, by way of loan, of such part of the income as he might think right, to poor persons residing in the said parish; and he was also to ascertain and report, whether any, and what increase ought to be made to the sums then payable to the persons residing in the almshouses; and he was to approve of a scheme for the appointment and keeping up of a sufficient number of substantial householders as trustees for carrying into effect such scheme as he might approve of.

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The scheme as settled, and afterwards sanctioned by the Court, provided for the application of the funds and income of the charity to the following purposes, subject to certain conditions and regulations respectively—300*l.* per annum out of the income towards the support of the parochial charity schools. A sum not exceeding 800*l.* out of the funds, if necessary, for the enlargement of such schools. A sum not exceeding 1,500*l.*, out of the same funds, for the erection of infant schools, to be open to the children of all the poor inhabitants of the parish, between the ages of two and seven: and a sum of 400*l.*, from the income, for the support of such schools. Such sum as the Master should approve for the purchase of a site for, and the establishment of, a commercial *school, for the children of the same class, subject to the payment by each child

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of 15*s.* every quarter. And the sum of 600*l.* per annum, out of the income, for the support of such school. The sum of 200*l.* per annum for apprenticing children of poor householders in the parish. Certain sums, amounting together to 700*l.* per annum, out of the income, as annual donations to several hospitals and societies for the relief of the sick in the parish, with liberty to the managers to withdraw such donations, or any of them, and apply the same to some other of the charitable objects thereby provided for. The stipends of the inmates of the existing almshouses to be increased to 80*l.* Such sums as the Master should approve for the purchase of a site for, and the erection of, forty new almshouses, in lieu of the existing ones, for the reception of forty poor persons, twenty men and twenty women, subject to certain qualifications as to previous residence and payment of rates in the parish. If any surplus of income should remain after answering the purposes before-mentioned, such surplus was to accumulate at compound interest, for the purpose of creating a reserved fund of 8,000*l.* to answer extraordinary contingencies, and subject thereto, and to keeping up such fund from time to time when reduced by expenses defrayed out of it, the surplus was to be applied, to the extent of not more than 210*l.* in any one year, in the payment of premiums of from 10*l.* to 15*l.*, to persons not in the receipt of parochial relief, and eligible for the almshouses, but not being inmates thereof.

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APPERLY v. PAGE.

(1 Phillips, 779—789; S. C. 4 Rail. Cas. 576; 16 L. J. Ch. 302; 11 Jur. 271.)

KNIGHT
BRUCE, V.-C.
On Appeal.
April 13, 16.

Lord
COTTENHAM,
L.C.

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A bill may be filed against the directors of a provisionally registered Railway Company, after its dissolution, by some of the shareholders on behalf of all, except those defendants, for the winding up of its affairs, though the bill prays not only the collection of the joint property and its application in discharge of the joint liabilities, but also the distribution of the surplus among the shareholders in proportion to the amount of their respective subscriptions.

In a bill filed against the directors of a provisionally registered Railway Company by some of the shareholders, on behalf of all except the defendants, for the winding up of its affairs, after stating that a certain number of persons had executed the Parliamentary contract as subscribers for certain shares, but that they had not paid their deposits, and that no shares or certificates of shares had been issued to them, it was alleged that the plaintiffs were ignorant of their names and addresses: Held, on demurrer for want of parties, that that allegation was a sufficient excuse for not making those persons defendants, although the Standing Orders required that a copy of the Parliamentary contract containing the names and addresses of all persons who had executed it, should be deposited in the

Private Bill Office, and it appeared from statements in the bill that that document had been deposited pursuant to the Standing Orders, and that the plaintiffs had procured a copy of it.

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Where a bill by certain persons, on behalf of themselves and others, for relief against an alleged breach of trust, is demurred to, on the ground that some of the parties, on whose behalf the plaintiffs profess to sue, appear to have been implicated in the transaction complained of, the proper test of the objection is to see whether the bill states facts with respect to those parties, which, as against them, would amount to a defence to the suit.

THIS was an appeal from an order of Vice-Chancellor KNIGHT BRUCE, overruling a general demurrer to a bill filed against the provisional directors of a Railway Company by five shareholders, on behalf of themselves and all the rest except the defendants.

The bill represented that the scheme originally announced by the prospectus was, at first, one of great promise, and that the defendants had applications made to them by substantial parties for shares exceeding the number which would have been sufficient for raising the whole amount of capital required for the undertaking; but that by negligence and misconduct they omitted to take advantage of such applications, and that before the end of October, 1825, they had ascertained, as the fact was, that the required amount of capital could not be raised, and that the scheme had become abortive and impracticable; *but that they concealed that fact from the plaintiffs and the other shareholders; and having induced them to execute the subscribers' agreement and Parliamentary contract in the belief that a proper allotment of shares had been made, to the full amount required for raising the proposed capital, they caused surveys to be made, and incurred other expenses to a large amount in further prosecution of the scheme; and that, availing themselves of a power which they had caused to be introduced into the subscribers' agreement, unknown to the plaintiffs, at variance with the terms of the original prospectus, authorising them to limit the scheme to a portion of the line originally proposed, they applied to Parliament in the ensuing Session for an Act to enable them to make such shorter line; but not having obtained subscriptions to the amount of a sufficient proportion of the capital required, even for that line, to satisfy the Standing Orders of the Houses of Parliament, they caused and procured the Parliamentary contract to be signed by divers persons to the extent, nominally, of 955 additional shares, but which shares were wholly fictitious, no certificates having been issued or deposits paid upon them; and that, previously to a meeting of the shareholders, convened in the month of May, 1845, pursuant to certain

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resolutions of the House of Commons, for the purpose of enabling the shareholders to determine by a majority of votes whether the same should or should not be proceeded with, the defendants, in order to enable them to obtain an authority to proceed with their bill in Parliament, had purchased, or procured to be purchased for small sums of money a large number of scrip certificates of shares in the Company, which enabled them at the meeting to carry a resolution in favour of proceeding with the bill. That the result, however, was *that the bill, after having passed the House of Commons, was rejected by the House of Lords; so that, as the subscribers' deed only authorised an application to Parliament in that Session, the scheme was completely frustrated and at an end.

The bill charged that the names of the persons who so nominally subscribed the Parliamentary contract were unknown to the plaintiffs, and that they were unable to ascertain them; but that they were known to the defendants, who refused to discover them. In another passage, however, the bill noticed the fact of the plaintiffs having procured, from the Private Bill Office of the House of Commons, a copy of the Parliamentary contract which had been deposited there by the defendants, agreeably to the Standing Orders in that behalf, on the occasion of their applying for their Act.

It then charged that the number of the shareholders in the Company was so great, and their rights and liabilities so subject to change by death and otherwise, that it would not be possible, without the greatest inconvenience, to make them parties to the suit, and so to do would render it impossible to bring the suit to a termination; but that the interests of all the shareholders, except the defendants, were identical with those of the plaintiffs, and that none of the shareholders, except the defendants, had interests adverse to, or differing from those of the plaintiffs in respect of the matters therein mentioned, or in respect of the property of the Company, or the surplus thereof; and that all the shareholders, except the defendants, had a common interest in obtaining, and, in fact, consented and agreed to, the relief thereby prayed.

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The prayer of the bill was, that it might be declared that the object and purposes for which the Company was proposed to be established had failed through the neglect and misconduct of the defendants, and that the defendants were not justified in prosecuting the undertaking after the failure thereof, and that they were not entitled to retain or deduct out of the funds of the Company any expenses incurred in prosecuting the undertaking subsequent to

such failure; and that an account might be taken of the receipts and payments of the defendants, on account of the Company; and that the defendants might be charged with and decreed to repay all monies which should appear to have been improperly paid by them out of the funds of the Company; and that the plaintiffs and the other shareholders in whose behalf they sued might be declared liable to contribute such proportion of the expenses properly incurred, as the number of shares held by them respectively bore to the whole number into which the capital of the Company was originally proposed to be divided, or such other proportion of the said expenses as the Court should, under the circumstances, deem to be just; and that the residue of the deposits, after deducting thereout the amount of their respective contributions to such expenses, might be repaid to the plaintiffs and the other shareholders on whose behalf they sued; and that an account might be taken of the monies and funds remaining in the hands or at the disposal of the defendants, including a sum of 39,000*l.* which had been deposited by them in the Bank of England, pursuant to the Standing Orders, on applying for the Act; and that the said monies and funds might be applied in payment of the debts and liabilities properly incurred by the defendants on behalf of the Company, if any such then remained unpaid; and that the residue thereof might be paid and applied in aid of the objects of this *suit in such manner as the Court should direct; and, if necessary, that some proper person might be appointed to receive and get in the monies and assets of the Company then outstanding; and, in the mean time, that the defendants might be restrained by injunction from receiving or demanding payment of any of such outstanding monies or assets, and from paying or assigning, or in any manner parting with, any of the monies or assets of the Company then in their possession.

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On the hearing of the appeal,

Mr. Speed (in the absence of *Mr. Russell*), for the appellant, took three points:

1st. That, inasmuch as the bill prayed not only the application of the partnership funds in payment of the partnership liabilities, as in *Wallworth v. Holt* (1), but a general account and distribution of the surplus, which was, in effect, a complete winding up of the concern and adjustment of the rights of the shareholders *inter se*, it was necessary that all the shareholders should be personally, and

(1) 48 R. R. 187 (4 My. & Cr. 619).

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not merely by representation, parties to the record: *Richardson v. Hastings* (1).

2ndly. That the parties who executed the Parliamentary contract for the 955 shares, ought to have been made defendants; and that the usual allegation, that the plaintiffs did not know their names, was no excuse for omitting them, being evidently untrue, because their names and addresses were, by the Standing Orders, required to be stated in the Parliamentary contract, of which the plaintiffs admitted they had obtained a copy from the Private Bill Office.

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3rdly. That, with reference to that part of the bill which sought to charge the defendants with the consequences of their alleged misconduct, in exoneration of the rest of the shareholders, those parties who voted with the defendants at the meeting in May were improperly included in the class on whose behalf the plaintiffs professed to sue, being themselves implicated with the defendants in the breach of trust with which they were charged.

In the course of the argument,

The LORD CHANCELLOR observed, with respect to the first point, that the express ground of the decision in *Richardson v. Hastings* was, that it appeared upon the face of the bill that questions might arise in the winding up of the concern, in which the plaintiffs and those whom they professed to represent might have conflicting interests. The inference from which was, that, if the MASTER OF THE ROLLS had had such a case as the present to deal with, he would have overruled the objection.

In no case (continued his Lordship) can a person sue on behalf of others, unless what he sues for is beneficial to all whom he represents as well as to himself. Therefore you cannot ask by such a bill to rescind the contract of partnership, because *non constat* that the contract may not be beneficial to some: but here no contract exists; for the Parliamentary contract contemplated an Act of Parliament being obtained in the ensuing Session, and, the attempt to obtain one having failed, the contract is at an end with the purpose for which it was entered into.

Mr. Rolt and *Mr. Daniell* appeared for the respondent, but,

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On the conclusion of the argument of the appellant's counsel,

The LORD CHANCELLOR said, that before he called on the other

side, he would read over the bill : that the case was one in which the Court might be under the necessity of extending the usual rule which regulated the institution of suits by some persons on behalf of themselves and others ; for if the objection for want of parties (and the demurrer resolved itself into that) were to prevail here, it was evident that there would be no remedy at all, and the defendants would be able to keep the money which they had got, in their pockets, and set the contributors at defiance. In such a case, his Lordship said, he should struggle to extend the rule if necessary ; but that, according to his present impression, it would not be necessary, for that there were authorities already which would justify the VICE-CHANCELLOR's order.

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At the sitting of the Court the following day,

THE LORD CHANCELLOR said :

In this case the grounds assigned for the demurrer were want of equity and want of parties : and the want of parties was stated to be, that all the shareholders were not made defendants ; the bill being by certain shareholders on behalf of themselves and all the rest, except the defendants. But, in the course of the argument, the objection was varied from what it was on the face of the demurrer ; for not only was the absence of those parties insisted on, but it was contended that, at all events, a class of persons who represented 955 shares, which had been subscribed for under particular circumstances, ought to have been parties to the suit.

Now the outline of the case is one which, but for certain special circumstances which are stated in the bill, is admitted not to be open to demurrer. The bill states that a plan was suggested for making a certain railway, under which many persons came in as subscribers, and, amongst others, the plaintiffs. That a large sum of money was subscribed ; but that the attempt to obtain an Act of Parliament failed, and that the scheme is now entirely at an end from the impossibility of raising sufficient capital to carry it into effect. The purpose, therefore, for which the parties came together is stated in the bill as no longer an existing purpose. The bill prays, after some directions as to disallowance of certain expenses to the defendants, that the surplus may be divided among the shareholders in proportion to the sums subscribed by them.

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Now that, apart from the special circumstances which are stated, is nothing more than the case of *Wallworth v. Holt*, in which, after

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reviewing all the authorities, I came to the conclusion that the rules of the Court permitted the plaintiff to sue on behalf of himself and others. Therefore it is clear that on that general ground the demurrer cannot be sustained.

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But then it is said, that by reason of some special circumstances in the case, certain persons cannot be supposed to be represented by the plaintiffs. These circumstances are comprised in two distinct allegations. The bill represents the conduct of the defendants to have been very improper towards the plaintiffs and the other shareholders, in persisting in the scheme, after they knew that it had become impracticable; and among other things it states that, notwithstanding they had at an early period ascertained that it would be impossible to obtain an amount of subscriptions sufficient to enable *them to obtain an Act, they represented to the public that the subscription was full; and that for the purpose of making that appear, they procured the Parliamentary contract to be subscribed by a number of their friends for 955 shares, being the number that was wanting to make up the required amount: but (and that is the charge on which the objection is founded) that those subscriptions were merely nominal, and that no shares or certificates of shares representing them, were ever issued to or taken by the subscribers, and that no part of the monies, which by the Parliamentary contract were represented to be paid by way of deposit upon them, was ever paid. The statement, therefore, is, that, in order to make up the number of subscriptions for shares required by the Standing Orders, certain shares were represented as taken up by persons who never paid their subscriptions or intended to do so. And upon that it is said that those persons ought to be defendants, because their case is not common with that of the plaintiffs, being parties to a breach of trust; and, therefore, if they have any interest, it cannot be represented by the plaintiffs, who complain of that breach of trust. But then there is an allegation that the plaintiffs do not know their names: and it is not disputed that in an ordinary case that allegation is a sufficient excuse for not making such parties defendants. But it is said that here the allegation cannot be true, because the Parliamentary contract, of which the plaintiffs have got a copy, shows who they are. But the Court cannot try the truth of an allegation upon demurrer, and, therefore, for the present it must be taken, as alleged, that the plaintiffs are ignorant of the names of those parties, and consequently excused from making them defendants.

The other special circumstance relied on is very much of the same character. The bill states that, *pursuant to a resolution of the House of Commons during the last Session, a meeting of the shareholders was called to consider whether the scheme should go on or not: "and that the plaintiffs and numerous other shareholders caused their votes to be recorded at that meeting against proceeding with the bill; but that the defendants, by means of scrip certificates which they had purchased, or caused to be held by persons under their influence, and by various undue means, procured a majority of votes to be recorded in favour of proceeding with the bill:" and, after suggesting a pretence that a majority of the shareholders sanctioned and approved of the bill, and authorised the defendants to proceed with it, the bill charges the contrary to be true, and "that the defendants had, prior to the meeting, and in order to enable them to obtain an authority to proceed with the bill, purchased, or procured to be purchased, for small sums of money, a large number of scrip certificates of shares in the Company, and to an amount sufficient to enable them to carry a resolution at the meeting in favour of proceeding with the bill; and they, in fact, carried such resolution by means of the scrip so purchased and procured to be purchased."

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Now, so far as the defendants themselves purchasing shares, and thereby acquiring more influence at the meeting than they ought to have had, or would otherwise have had, that is merely an allegation affecting the conduct of the defendants themselves. But the argument is, that all those who constituted the majority should be parties to the suit, and that they cannot now dispute the propriety of those proceedings, or of the expenses which were incurred in consequence of them. But, to sustain that objection, it must be shown that the bill contains allegations which would constitute a defence *to any relief on behalf of these parties. It may ultimately be made out by the defendants that certain of the persons who are by this bill associated with the plaintiffs were concerned with them, (the defendants,) in the acts complained of; and, if such a case be made out, it may no doubt hereafter create considerable difficulty in the prosecution of this suit. But that is not now the question: the question is, whether the allegations on the face of the bill show a clear participation in a breach of trust by these parties. They may have been induced to vote in that majority by the misrepresentations which the bill alleges to have been made by the directors respecting the affairs of the Company, and they may say

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that they are not precluded by a vote so given from seeking relief in common with the rest of the shareholders against the consequences of the proceedings which were resolved upon at that meeting.

These are the only circumstances which have been suggested as preventing the plaintiffs from filing this bill on behalf of themselves and other shareholders: and, as I am of opinion that neither of these objections can be supported, I think, the demurrer was rightly overruled, and that this appeal must be dismissed with costs.

1846.
March 31.
April 1,
13—16, 21, 22.

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On Appeal.

1847.
April 16, 17,
22, 23, 28.

Lord
COTTENHAM,
L. C.

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MOZLEY v. ALSTON (1).

(1 Phillips, 790—802; S. C. 16 L. J. Ch. 217.)

The rule that a suit by individual shareholders in an incorporated Company, complaining of an injury to the corporation, cannot be maintained, if it appears that the plaintiffs have the means of procuring a suit to be instituted in the name of the corporation itself, applies equally whether the subject-matter of complaint be an act or transaction which is merely voidable at the discretion of a majority of shareholders, or an act or transaction absolutely illegal, and incapable of being confirmed by such majority.

The Court will not entertain a bill by shareholders in an incorporated Company, seeking merely to restrain the directors *de facto* from acting as such, on the sole ground of the alleged invalidity of their title to their offices.

A general demurrer to a bill by two members of an incorporated Railway Company, in their individual characters, against the corporation and twelve other members who were alleged to have usurped the office of directors, and to be exercising the functions thereof, as a majority of the governing body, injuriously to the interests of the Company, praying that those twelve defendants might be restricted from acting as directors, and be ordered to deliver the common seal, and the property, and books of the Company in their possession, to six other persons, who were alleged to be the only duly constituted directors, was, on both the above grounds, allowed.

THIS was an appeal from an order of the VICE-CHANCELLOR OF ENGLAND overruling a general demurrer to a bill filed by two persons describing themselves as "holders of shares in the capital stock of the Birmingham and Oxford Junction Railway Company, who were duly registered, and had paid all their calls in respect of such shares" against eighteen persons who, *de facto*, constituted the existing body of the directors of the Company, and against the Company itself by its corporate title.

The bill, after setting forth certain clauses of the Company's Act, by which it was, amongst other things, provided that the number of directors should be twelve, with power to the Company to increase it to any number not exceeding eighteen, and that five should be a quorum

(1) *Burland v. Earle* [1902] A. C. 83, 93, 71 L. J. P. C. 1, 85 L. T. 553.

at their meetings, stated that an ordinary meeting of the Company was held pursuant to the Act on the 27th February, 1847, when it was adjourned to the 13th March at four o'clock p.m.; and that an extraordinary meeting of the Company was held on the *same 13th March at two o'clock p.m., pursuant to a special notice thereof duly given, "for the purpose of considering the propriety of, and if so determined, taking the necessary steps at such meeting for increasing the number of directors, which was then twelve only, by the election of six new ones, and also for the purpose of considering the provisions of a bill, intituled 'A proposed bill for uniting the Birmingham and Oxford Junction Railway Company, and the Birmingham, Wolverhampton, and Dudley Railway Company into one, and for authorising the sale of the latter railway and other new works to the Great Western Railway Company,' and of considering and determining upon the propriety of introducing into Parliament, or of proceeding with or withdrawing the said bill, and, if thought fit, of taking such steps for proceeding with or withdrawing the said bill, and passing such resolutions and giving such instructions to the directors of the Birmingham and Oxford Railway Company touching any sale or other disposition of the said railway, or for effecting any of the above mentioned purposes, as the meeting should think expedient."

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That at the extraordinary meeting, it was resolved that the number of directors should be increased to eighteen, and six additional directors were accordingly elected, after which the meeting was adjourned to five o'clock p.m. of the same day.

The bill then stated, in substance, that the defendants were, on the 27th February, 1847, the duly constituted directors of the Company, the greater part of them having been duly elected in the month of October, 1846, and the rest having been appointed to fill vacancies which had occurred during the interval; and that, according to the true construction of the Company's Act, one-third of the *number ought to have gone out, by balloting or agreement amongst themselves, at the ordinary meeting of the 27th February, or the adjourned ordinary meeting of the 13th March, and to have been replaced by the election of four new directors; and that, accordingly, at the adjourned ordinary meeting, which was duly held on the 13th March at four o'clock, a shareholder moved that one-third of the directors who were in office previously to the 27th February, 1847, should retire from office, pursuant to the provisions of the Act, and that the twelve should agree or determine among themselves

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which of them should retire ; but that, although the motion was duly seconded and carried unanimously by all the shareholders present at the meeting, except the twelve original directors themselves, the chairman, who was one of their number, refused to put it, and the twelve refused to retire or to determine or agree which of them should retire, insisting that they were still lawful directors and entitled to act as such ; and that, in consequence of such refusal, the shareholders present at the meeting were deprived of, and unable to exercise, their right of electing persons to supply the place of the directors who ought then to have retired.

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The bill then stated that the adjourned extraordinary meeting was duly held at five o'clock of the same day, when it was resolved, that the proprietors of the Company, wholly disapproving of the proposed amalgamation of the Birmingham and Oxford Railway with the Birmingham, Wolverhampton, and Dudley Railway, and of the proposed sale of both concerns to the Great Western, the directors should be, and they were, thereby instructed not to proceed with, but to withdraw from, the bill then before Parliament for those objects, and that they be further instructed to affix the Company's seal to the petition then read against such *bill, and to take all necessary measures for opposing it in both Houses of Parliament ; and the chairman having refused to affix the common seal of the Company to such petition, it was further resolved that certain shareholders, who were specified, should be authorised to sign the same on behalf of the meeting.

That there were present at both the adjourned meetings upwards of seventy shareholders holding personally, and representing by proxy, upwards of 35,000 shares out of 50,000, which constituted the whole capital, and that all the resolutions come to at those meetings were passed almost unanimously, except that the twelve original directors declined to vote and objected to the said resolutions.

The bill then charged that, by reason of the aforesaid conduct of the twelve directors at the adjourned ordinary meeting, it had become impossible to ascertain which of them ought to have retired from office, and consequently that they were not, nor was any of them, competent in law to act or vote as directors or a director of the Company, and that the six newly appointed directors were the only persons now competent to act as lawful directors thereof ; but that the twelve, nevertheless, retained the possession and custody of the common seal, and the books and documents of the Company, to the exclusion of the six new directors, although

such possession and custody by the lawful directors was absolutely necessary for the interests and purposes of the Company; and that the defendants, asserting that they were a majority of the body of directors, threatened and intended to assemble and vote as such, and to employ the common seal, and thereby to represent their acts as the lawful corporate acts of the Company, and to bind the Company thereby: that they *had in fact acted, and were now acting, in divers matters which were of the utmost importance to the Company, and had under their control large sums of money, amounting to upwards of 100,000*l.* belonging to the Company, which they threatened and intended to deal with and expend; and that previously to the adjourned ordinary meeting, they had procured the before-mentioned bill to be brought into Parliament, and that they intended to represent themselves before Parliament as a majority of the lawful directors of the Company, and in that pretended character to procure the said bill to be passed; and, by retaining the common seal in their exclusive possession and control, to prevent the use thereof by the Company or its lawful officers, for the purposes of the Company, and to prevent the Company from being represented before Parliament by its lawful directors, counsel, and agents; whereas, the bill charged that, the twelve had ceased to be, and were now, incapable of acting as lawful directors of the Company, and that the Company and its interests would be greatly prejudiced if they should be permitted to act as directors of the Company in the matters therein mentioned or otherwise, although the plaintiffs did not seek to prevent them from acting or being represented before Parliament or otherwise, as they might think fit, in their own names and characters, as individual shareholders.

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The prayer of the bill was, that the twelve directors and every of them might be restrained by injunction from voting or acting as directors or a director of the Company, and that they might be ordered to place the common seal, and all the books, documents, and property of the Company, in their custody, possession, or power, under the control of the lawful directors of the Company for the purposes of the Company.

The corporation and the twelve directors whose title was impeached, put in two separate demurrers, both of which were overruled by the VICE-CHANCELLOR. On the hearing of the appeal,

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Sir Fitzroy Kelly, Mr. Rolt, and Mr. G. Russell, appeared for the appellants.

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Mr. Bethell, Mr. James Parker, and Mr. Willcock, appeared for the respondents.

A great part of the argument turned upon the construction of the Act of Parliament, the appellants contending, in opposition to the construction suggested by the bill, that none of the twelve directors who were in office on the 18th of March, were bound to have then retired, but that they were all entitled to retain their offices until the ensuing year; and that, even if they ought to have balloted out four of their number on the 18th of March, it did not follow that they, or any of them, therefore, ceased to be directors, or to act as such, so long as no others were validly appointed in their places.

On the question of jurisdiction, and the frame of the bill,

It was contended, on the part of the appellants, that, if the plaintiffs were right upon the construction of the Act, the proper remedy was at law, by *mandamus*; and, further, that, as the subject-matter of complaint, if it was an injury at all, was an injury to the whole corporation, the suit could not be sustained by individual members, unless, at least, it were shown that the Company could not, or would not, institute proceedings in their corporate capacity: *Foss v. Harbottle* (1).

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On the other hand, it was insisted that *Foss v. Harbottle* did not apply, the only point decided in it being, that the Court would not interfere with transactions, affecting a Company, which were merely voidable, at the instance of some only of the shareholders, although they professed to sue on behalf of themselves and the others; because such transactions were capable of being confirmed, and different members of the Company might entertain different opinions as to the expediency of confirming them. But what the Court was asked to do in the present case, was to interfere, not with what was merely voidable, but with acts, which, if the plaintiffs were right, were illegal and absolutely void, and which, therefore, could not be confirmed by a majority of shareholders, however large, so long as there was one who objected to them: for the complaint was, that twelve out of eighteen directors who assumed to act as a majority of the governing body were illegally in possession of their offices, and had no authority to act at all: and that was a complaint for which each and every

shareholder in the corporation was entitled to seek redress without the concurrence of the rest, and even in spite of the rest.

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It was upon that principle, that both in *Ware v. The Grand Junction Waterworks Company* (1) and in *Ward v. The Society of Attorneys* (2), the Court granted an injunction against a Company and its governing body at the instance of a few individual members. Those cases then were authorities in point, for the frame of this bill: and as to the substance of it, there could be no doubt that it was the familiar practice of this Court to entertain jurisdiction for the purpose of keeping great public bodies within the limits of their Parliamentary or corporate *powers. That was the object of this suit. It was said, indeed, that the proper remedy was by *mandamus*; but, even supposing that the writ would lie in such a case, which was perhaps doubtful, *Reg. v. Alderson* (3), the remedy it afforded, would, without the aid of the ancillary jurisdiction of this Court, be too tardy to be effectual for its purpose.

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THE LORD CHANCELLOR:

This is a case in which two persons, not alleging distinctly that they are shareholders in a Railway Company, but so describing themselves, file a bill in which they allege, that, owing to circumstances which I do not particularly enter into, twelve persons who were originally appointed directors, ought, at a day now past, to have ballotted out four of their number in order that four others might be elected in their stead: that they omitted to do so, and that, consequently, there is not now a body of directors constituted according to the Act; and, therefore, praying an injunction to the effect that these twelve persons may be restrained from voting or acting as directors of the Company, and that they may be ordered to deliver the seal and the property and books of the Company in their possession into the hands of six other persons, who, the bill alleges, were appointed under a provision of the Act, authorising the Company to increase the number of the directors from twelve, the number originally contemplated, to eighteen. The result, therefore, of the injunction prayed, is, that twelve out of eighteen who now exercise the functions of directors, may be restrained from acting, and that all the duties of the governing body may be performed by the six.

Now the first thing to be observed is, that the bill does not pray

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(1) 34 R. R. 136 (2 Russ. & My. 470).

(3) 1 Q. B. 878.

(2) 66 R. R. (1 Coll. 370).

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that the Court may set right what is alleged to be wrong; but there being, according to the allegation of the bill, four among the twelve who ought to have gone out, and it being, as it is alleged, impossible to ascertain who those four are, it is insisted that the whole of the twelve are illegally exercising the functions of directors, and ought to be restrained from so doing.

Now it is not my intention to give any opinion upon the construction of the Act, because I see quite enough to make it my duty to allow these demurrers, without going into that question; and, indeed, one of the grounds on which I have come to this conclusion is, that it is not within the jurisdiction of this Court to entertain that question at all, and I therefore abstain from expressing any opinion upon it.

The bill, as I stated, is a bill by two shareholders in their individual characters only, praying relief, in which all the other shareholders are interested. It is quite clear that some years ago no one would have entertained any doubt that such a bill was demurrable. It is true that the rule which requires all persons interested to be parties, has been relaxed to meet the exigencies of modern times, it being found that too strict an adherence to it would operate in many cases as a denial of justice, and leave parties who had a real grievance without a remedy. And, therefore, where the grievance complained of is common to a body of persons too numerous to be all made parties, the Court has permitted one or more of them to sue on behalf of all, subject, however, to this restriction, that the relief which is prayed must be one in which the parties whom the plaintiff professes to represent, have all of *them an interest identical with his own: for if what is asked may by possibility be injurious to any of them, those parties must be made defendants, because each and every of them may have a case to make, adverse to the interest of the parties suing: *Taylor v. Salmon* (1), *Wallworth v. Holt* (2). If, indeed, they are so numerous that it is impossible to make them all defendants, that is a state of things for which no remedy has yet been provided; but no such inconvenience arises in the present case; and it is sufficient for the present purpose to say, that in the cases to which I have referred as instances of the relaxation of the rule, all persons interested in the subject-matter of the suit have been parties either actually or by representation, and that in none of those cases has it been permitted to one or two to

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(1) 48 R. R. 34 (4 My. & Cr. 134). (2) 48 R. R. 187 (4 My. & Cr. 619).

institute a proceeding in their individual characters for a purpose common to all. The evil which would result from such a course is perfectly apparent; for if it were permitted to one or two, it must be permitted to all, and then as many bills might be filed as there were shareholders in a Company, all praying different things, or the same thing in a thousand different ways. I think, therefore, that if there were no other objection to this bill, but the shape and form of it, as filed by one or two shareholders, not on behalf of themselves and others, but in their individual characters only, that objection alone would be fatal to it.

That, however, might be easily corrected by amendment, and, therefore, a decision upon that point only would not finally dispose of the question between these parties. But another and more important objection is this. The complaint against the defendants is, that they are illegally exercising the powers of directors, and illegally retaining the seal and property of the Company. *That, if it be an injury at all, it is an injury not to the plaintiffs personally, but to the corporation of which they are members—a usurpation of the office of directors, and, therefore, an invasion of the rights of the corporation; and yet no reason is assigned by the bill, why the corporation does not put itself in motion to seek a remedy.

A case occurred some time ago before Vice-Chancellor Wigram, which is identical in principle with the present, I mean the case of *Foss v. Harbottle*. An attempt, indeed, was made to distinguish them, but it entirely failed. In one respect, that was a stronger case for the interposition of this Court than the present, for the bill stated a case of malversation in the corporate officers which was properly a subject of equitable relief. The plaintiffs sued, not as here in their individual characters only, but on behalf of themselves and all the other shareholders, except a few who were made defendants; but the VICE-CHANCELLOR, after examining all the authorities, decided that such a bill could not be supported; and as one of the reasons for coming to that conclusion, he said that, for any thing that appeared to the contrary, there existed in the Company the means of rectifying what was complained of, by a suit in the name of the corporation. And the same observation applies with still greater force to the present case, for not only does it not appear that the plaintiffs have not the means of putting the corporation in motion, but the bill expressly alleges that a large majority of the shareholders are of

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the same opinion with them; and, if that be so, there is obviously nothing to prevent the Company from filing a bill in its corporate character to remedy the evil complained of. Such a bill would be free from the objections to which I have referred as existing in this case, for it would be a bill by a body legally authorised *to represent the interests of the shareholders generally; but to allow, under such circumstances, a bill to be filed by some shareholders on behalf of themselves and others, would be to admit a form of pleading which was originally introduced on the ground of necessity alone, to a case in which it is obvious that no such necessity exists. It appears to me, therefore, that the case of *Foss v. Harbottle*, so far as relates to this point, is identical in principle with the present; and thinking, as I do, that the observations of the VICE-CHANCELLOR in that case, in which he pronounced a very elaborate judgment, correctly represent what is the principle and practice of the Court in reference to suits of this description, it is unnecessary for me to say more on the present occasion, than that I fully concur in them: and I should not hesitate to adopt them in this case, even if the first objection, to which I have referred, was removed, by making this a bill on behalf of the shareholders generally, instead of being a bill by two of them in their individual characters only.

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But there is another thing in the way of the plaintiffs which must be very carefully considered before any other attempt is made to obtain the interposition of the Court in a case like the present; and that is, that the ground on which the whole complaint rests, is, that those who are acting as directors are not directors: all turning, therefore, on the question, whether they are or are not entitled to the corporate offices, the functions of which they profess to exercise. I asked several times, in the course of the argument, whether there was any instance to be found of a bill seeking such relief as is here prayed, solely on the ground of the supposed invalidity of the title of persons claiming to be corporate officers. The argument was interrupted by an interval of several days, yet no such case was produced. I did not expect to hear of one, and the search which I must *presume has been made by counsel, satisfies me that no such case exists. This, therefore, is the first time that the Court has been called upon to interpose under such circumstances. That alone would be sufficient to deter me from assuming a jurisdiction which, it appears, my predecessors have never exercised, and of which it would be difficult to assign the limits or the end. The whole case depends upon a

pure question of law—whether the parties claiming to be directors do or do not lawfully fill that character. That is a preliminary question which must be decided before this Court can make any decree: there are other modes open to the parties by which it may be decided, and I will not be the first to bring it into a court of equity. But when it is decided, and even supposing that it is decided in favour of the plaintiffs, what will there remain for this Court to do? It is not pretended that I can give directions which will set this corporate body right, if it has gone wrong; I am not asked to direct that a meeting should be convened in order to determine which of these twelve persons ought to go out of office, and to appoint others in their place; it is not pretended that I have jurisdiction to do that; but the only equitable relief which I am asked to administer is to restrain them from acting as directors. Is not that asking me to do what, in the great majority of cases, would put an end to the corporation altogether? It may not be so in this case, because six other directors have been appointed; but the jurisdiction, if admitted, would extend to a case in which that circumstance did not exist. And yet this is what these plaintiffs, who profess to have the interest of the corporation at heart, ask me to do.

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Any one of these reasons would satisfy me that the Court ought not to exercise jurisdiction upon this bill. And I am, therefore, of opinion, that the demurrers ought to be allowed.

HALL v. MACDONALD (1).

(14 Simons, 1.)

1844.
Jan. 19.

Real estates devised by will to a trustee were sold for payment of the testator's debts by order of the Court in a creditor's suit for administration. Held that the trustee was entitled to retain a debt due to him from the testator, out of the proceeds; and that his right was not prejudiced by the proceeds having been paid into Court.

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[LINDLEY, L. J., observed (see 27 Ch. D. at p. 484), that the decision in *Hall v. Macdonald* may have been right, but the absence of facts makes it useless as an authority.—O. A. S.]

(1) *In re Illidge* (1884) 27 Ch. D. 478, 53 L. J. Ch. 991, 51 L. T. 523.

1844.

TAYLOR v. HAYGARTH (1).

Feb. 16, 17,
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(14 Simons, 8—20.)

The executors of a testatrix who died in 1838 intestate as to the residue of her personal estate, and without next of kin, cannot retain the undisposed-of personal estate as against the Crown where their claim, if the testatrix had left next of kin, would have been defeated by the implication of a trust prior to the Act 11 Geo. IV. & 1 Will. IV. c. 40.

But trustees of real estate devised to them by will upon trust for sale could retain the proceeds of sale as against the Crown where there was no person interested in the proceeds under the conversion and no heir-at-law (2).

SARAH WHITTELL, the testatrix in the cause, by her will, dated in August, 1837, after giving 100*l.* to each of her executors, and legacies of different amounts to other persons, gave all the rest of her property, real as well as personal, to the defendants, Haygarth, Dobson and Watson, their heirs, executors &c., in trust to sell the same, absolutely, immediately after her death; and, for that purpose, to make contracts, transfers and conveyances, and to give discharges for the purchase-money; and to invest the surplus, after paying the expenses of the sale, in their names, in the usual securities, and, out of the income, to pay certain annuities; and, subject thereto, to stand possessed of the capital in trust for such person or persons as she should direct by any codicil to her will: and she empowered the trustees to lease her real estates, from time to time, until they should be sold, for twenty-one years, if they should think fit so to do; and she appointed Messrs. Haygarth, Dobson and Watson to be the executors of her will.

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The testatrix died in January, 1838, seised and possessed of freehold, copyhold and personal estate, but *without having made any codicil; and, as she was illegitimate and never had been married, she left neither heir nor next of kin.

Her personal estate was more than sufficient to pay her funeral and testamentary expenses, debts and legacies, and to provide funds for payment of the annuities given by her will: the trustees, however, sold her real estate and invested the greater part of the proceeds in the purchase of stock in their own names.

(1) *In re Bacon's Will* (1886) 31 Ch. D. 460, 55 L. J. Ch. 368, 54 L. T. 150; and *In re Bond* [1901] 1 Ch. 15, 70 L. J. Ch. 12; 82 L. T. 612.

(2) But now equitable estates in such case escheat under the Intestates' Estates Act, 1884 (47 & 48 Vict. c. 71), ss. 4, 7, and the title of the

Crown by escheat would appear to be paramount to any claim under the conversion unless such conversion was duly effected, in which case the undisposed-of proceeds may be claimed as *bona vacantia* by the Crown: *In re Bond* [1901] 1 Ch. 15, 70 L. J. Ch. 12.—O. A. S.

At the hearing of the cause for further directions, the question was whether the residue of the personal estate and the proceeds of sale of the real estate, belonged to the Crown or to the trustees. The suit, however, was so constituted with respect to parties, that that question arose between co-defendants, namely, the *Attorney-General* on the one hand, and the trustees on the other; and the VICE-CHANCELLOR said that, on that account, he could not decide the question in the present suit. The counsel for the contending parties replied that they wished to obtain the decision of the Court upon their claims, with as little delay and expense as possible: in consequence of which, his Honour allowed the hearing of the cause to proceed.

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HAYGARTH.

Mr. Walker and *Mr. E. Montagu* appeared for the plaintiff, who, being merely a pecuniary legatee under the will, made no claim either to the residue of the personal estate or to the produce of the real estate.

Mr. Twiss and *Mr. Wray* for the *Attorney-General*, said that, as the testatrix had left no next of kin, the Crown was entitled to her undisposed-of personal estate; and that as she had left no heir and had directed her *real estate to be sold out and out, immediately after her death (which distinguished this case from *Burgess v. Wheate* (1)), the Crown was entitled also to the proceeds of the sale, as being *bona vacantia*. [*Middleton v. Spicer* (2); *Attorney-General v. Holford* (3); *Smith v. Claxton* (4); *Du Hourmelin v. Sheldon* (5), and other cases were cited.]

[*10]

Mr. Teed and *Mr. F. J. Hall* for Haygarth and Dobson, and *Mr. Koe* and *Mr. Chandless* for Watson, said that their clients, as the executors of the will, were entitled, by the common law, to the testatrix's undisposed-of personal estate; and that, as she had left no next of kin, their right was not affected by the 11 Geo. IV. & 1 Will. IV. c. 40; that Act having made no alteration in the law, except in cases where the deceased had left next of kin: *Hawkins v. Hawkins* (6).

With respect to the testatrix's real property, they said that the Crown would have had no claim to it, by escheat, if it had not been directed to be sold; for, by the will, the legal estate in fee was

(1) 1 Eden, 177.

(2) 1 Br. C. C. 201.

(3) 16 R. R. 737 (1 Price, 426).

(4) 20 R. R. 320 (4 Madd. 484).

(5) 48 R. R. 165 (4 My. & Cr. 525).

(6) 40 R. R. 92 (7 Sim. 173).

TAYLOR
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HAYGARTH.

vested in the trustees, and, therefore, the trustees would have been entitled to hold it for their own benefit, according to *Burgess v. Wheate*; and that the circumstance of the testatrix having directed the property to be sold, could give no right to the Crown: for the Court did not convert real estate for the benefit of the Crown: *Henchman v. Attorney-General* (1). * * *

[12]

Mr. Cooke appeared for another defendant.

On *Mr. Wray* rising to reply,

THE VICE-CHANCELLOR said:

I will not trouble you to address any argument to me respecting that part of the testatrix's property which was personalty at her death.

The three executors not only have legacies of equal amount given to them; but the personal property is bequeathed to them in trust; and, as it is so bequeathed, they are precluded from claiming it for their own benefit, notwithstanding no trust is declared.

[*13]

Lord THURLOW concludes his judgment in *Middleton v. Spicer*, in the following words: "The executors being *excluded and no relations to be found, I consider the executors as much trustees for the Crown, as they would have been for any of the next of kin, if these could have been discovered." Those words are strictly applicable to the present case; and, therefore, I am of opinion that the Crown is entitled to the testatrix's undisposed-of personal estate.

That being my clear opinion, I will thank you to confine yourself, in your reply, to that portion of the testatrix's property which was real estate at her death; and to which the position laid down, by Lord LOUGHBOROUGH, in *Walker v. Denne* (2) seems to be applicable, namely, that the Crown comes under no head of equity.

Mr. Wray, [in reply, as to the proceeds of sale of the real estate sold by the trustees].

[16]

THE VICE-CHANCELLOR:

This case has been argued for three days; so that I have had time to consider it and the authorities that bear upon it, which, in fact, are not numerous, but lie in a very small compass.

The construction of the will seems to be exceedingly simple and clear; and I have not the slightest doubt that, if any person had

(1) 41 R. R. 102 (3 My. & K. 485).

(2) 2 R. R. 185 (2 Ves. Jr. 185).

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been named in a codicil, as an object of the trust created by the will, that person would have had a right to call for a conversion of the estate; and it would have been a mere matter of course for this Court to decree the estate to be sold; my opinion being that the whole legal fee simple is vested in the devisees in trust; and that what is called the power of leasing was intended only to be used from time to time, until, in the opinion of the devisees in trust, a proper occasion had arisen for selling the estate.

It turns out that the testatrix did not make any codicil, and that she left neither next of kin nor heir: and I have already expressed an opinion, which, I think, is fully warranted by *Middleton v. Spicer*, that the Crown is entitled to that part of the testatrix's property which was personal estate at the time of her death.

The only question that remains to be disposed of, relates to the real estate. Now, whatever opinion might have been originally entertained about *Burgess v. Wheate*, it has remained unreversed for more than eighty years; *and, consequently, it must be considered as binding upon the Court. It is observable that it was not the decision of one Judge against another; but of Lord Keeper HENLEY and Sir THOMAS CLARKE, M. R., against the opinion of Lord MANSFIELD. The MASTER OF THE ROLLS and the LORD KEEPER agreed upon a point of equity, against the CHIEF JUSTICE of the King's Bench. The case was nothing more than this. A legal estate was vested in a trustee, in trust for A. who died without an heir; and it was held that the trustee might hold for his own benefit; the Crown having no equity to claim on the ground of escheat. That was held by Lord Keeper HENLEY and Sir THOMAS CLARKE against the opinion of Lord MANSFIELD: and, in deciding the present case, I must take it to be the law.

[*17]

Now it was said that, inasmuch as there was, clearly, a direction, in the will, that the real estate should be sold, therefore the Crown is entitled to the money that might have arisen from the sale. Upon that point I referred to *Walker v. Denne*, not so much for the decision, as for the sake of the positive proposition which is laid down by Lord LOUGHBOROUGH in that case (1). His Lordship says: "Then, is there any reason to raise an equity to convert the money into a different species of property, in order to create a different effect? There is no person claiming under the will of the testator, appearing to insist that it shall be considered as that which, *de facto*, it is not. The Crown comes under no head of equity. I

(1) 2 R. R. 192 (2 Ves. Jr. 185).

TAYLOR
 HAYGARTH.

think it would be a great stretch, even if that circumstance of the option was wanting; but, with that circumstance, to convert it for the Crown is too extraordinary for a court of equity." Therefore
 [*18] *the broad proposition is that the Crown comes under no head of equity.

The distinction between the case of *Middleton v. Spicer*, and the case now before me, is that, in the case of *Middleton v. Spicer*, the subject of dispute was personal estate. It was a mere chattel real; and there is no doubt that, by the law of the land, the Crown is entitled to the undisposed-of personal estate of any person who happens to die without next of kin. There the property at the death of the testatrix, did not require that there should be any act of a court of equity to give a foundation to the right of the Crown; but the Crown's right was independent of a court of equity. But here, in order to give a right to the Crown, it is absolutely necessary that the equity should be enforced, or at least enforceable, for the purpose of converting the freehold estate in fee simple into property of the description of personalty; and the real question is whether, attending to the authorities, there is an equity to compel the conversion for the Crown. Now I have the authority of the opinion expressed by Lord LOUGHBOROUGH, against the existence of any such equity; and, without assuming to myself the jurisdiction of the House of Lords, and entering into the question whether the decision of Lord Chancellor BROUGHAM in *Henchman v. The Attorney-General* is right or wrong, it is quite sufficient for me to say that, in making the decision which he did, he evidently referred to and relied upon the opinion expressed in the case of *Walker v. Denne*.

Then, as far as the question about the legal estate goes, I have the decision of a court of equity that the Crown shall not take it by escheat. And I have the opinion of two Lord Chancellors in succession, that there is no *equity for the Crown to call for a conversion of the land, in order that it may take the produce of it. I admit that, if there had been any next of kin of this lady living at her death, who afterwards died without next of kin, then the principle of *Middleton v. Spicer* would directly have applied. Because the Crown would have come in, in the place of the next of kin of an individual, who had a clear right, in equity, to call for the conversion of the real estate.
 [*19]

The point seems to me to be so clear upon the authorities, that I have thought it my duty to give my opinion upon it without delay: and, having regard to what was said by Lord LOUGHBOROUGH

in *Walker v. Denne*, and by Lord BROUGHAM, in reference to it, in *The Attorney-General v. Henchman*, my opinion is that the Crown has no equity to take, from the devisees, the produce of the estate which they have sold of their own authority. TAYLOR
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The result is that, after providing for the payment of the annuities given by the will and for the costs of the parties, out of the personal estate and the proceeds of the sale of the real estate, *pro ratâ*, the remainder of the personal estate will belong to her Majesty by virtue of her prerogative, and must be paid to such person as her Majesty shall appoint under her sign manual; and the remainder of proceeds of the sale of the real estate will belong to the defendants Haygarth, Dobson and Watson, and must be paid to them in equal third parts.

WATSON v. ENGLAND (1).

(14 Simons, 28—29; S. C. 8 Jur. 1062.)

1844.
Feb. 22.

A person ought not to be presumed to be dead, from the fact of his not having been heard of for seven years, if the other circumstances of the case render it probable that he would not be heard of though alive.

SHADWELL,
V.-C.
[28]

THE decree in this cause directed the Master to inquire and state whether Mary Bilton was living or dead, and, if dead, when she died &c. The Master reported that Mary Bilton was dead and that she died in 1821, being seven years after she was last heard of.

The report was founded on an affidavit made by a person named Mutch, not a relative of Mary Bilton, who deposed that, in 1809 or 1810, when she was about sixteen or seventeen years of age, she clandestinely left the house of her father, who was a small farmer in Yorkshire; and that she had not been since heard of, except that, in 1814, she wrote a letter to her sister, from Portsmouth, which the deponent saw, stating that she intended to go abroad.

The question was whether the above evidence was sufficient to warrant the Master's finding.

Mr. Bethell and *Mr. Hubback*, appeared for the exceptants to the report; and,

Mr. Wakefield and *Mr. Cankrien*, in support of it.

[29]

THE VICE-CHANCELLOR:

It strikes me that there is considerable difficulty about this case,

(1) *In re Benjamin* [1902] 1 Ch. 723, 71 L. J. Ch. 319, 86 L. T. 387.

WATSON
v.
ENGLAND.

which, like every case of the same nature, must be determined according to its own peculiar circumstances.

Here a girl about sixteen or seventeen years of age, whose father was a farmer, chose, for some reason which does not appear, to leave her father's house and to go no one knows whither. But it seems that, in August, 1814, she was at Portsmouth, and that she then intended to go abroad. Therefore it is but reasonable to presume that, all along, she had been concealing herself, and that she never intended to return home.

The mere fact of her not having been heard of since 1814, affords no inference of her death; for the circumstances of the case make it very probable that she would be never heard of again by her relations. How can I presume that she died in 1821, from a fact which is quite consistent with her being alive at that time?

The old law relating to the presumption of death is daily becoming more and more untenable. For, owing to the facility which travelling by steam affords, a person may now be transported, in a very short space of time, from this country to the backwoods of America, or to some other remote region, where he may be never heard of again.

1844.
Feb. 23.

COVENTRY v. HIGGINS.

(14 Simons, 30—31; S. C. 8 Jur. 132.)

SHADWELL,
V.-C.
[30]

Legacies to a testator's children payable upon an event which subsequently happens in the testator's lifetime carry interest from the death of the testator.

THE testator in this case bequeathed, amongst other legacies, 18,000*l.* to trustees, in trust to invest it in the usual securities, and, out of the interest, to pay 100*l.* a year for the maintenance and education of each of his three illegitimate children (two of whom were sons and the other a daughter), during their minorities, and to accumulate the residue and add it to the principal, and to pay one-third of the principal and accumulations to each of the sons as and when he should attain twenty-one; and to pay 1,000*l.*, out of the remaining third and the accumulations thereof, to the daughter on her attaining twenty-one or marrying under that age, with the consent of the trustees, and to stand possessed of the remainder in trust for her, for her separate use for life, and, after her death, for her children: and the testator directed all the legacies given by his will to be paid within three months after his death.

Both the sons attained twenty-one in the testator's lifetime, and the daughter married under that age, with the testator's consent.

The question was whether the children were entitled *to interest on their legacies from the testator's death, or only from the end of three months after that event.

COVENTRY
v.
HIGGINS.
[*31]

THE VICE-CHANCELLOR :

The legacies given to the sons, are directed to be paid to them on their attaining twenty-one; and, as they attained that age in the testator's lifetime, their legacies became payable on his death; and, consequently, they are entitled to interest from that time.

The case of the daughter is somewhat different. The testator has directed the trustees to pay her 1,000*l.* out of her legacy, on her attaining twenty-one or marrying under that age with their consent, and to pay the interest of the remainder to her for her separate use. She is still under age; but she married, in her father's lifetime, with his consent; which is equivalent to her marrying, after his death, with the consent of the trustees. Therefore, the principle which is applicable to the sons, is applicable to her also.

Mr. Bethell, Mr. Stuart, Mr. K. Parker, Mr. Bird, Mr. Torriano and Mr. Bacon appeared for the different parties.

SCOTT v. MOORE.

(14 Simons, 35—40; S. C. 13 L. J. Ch. 283; 8 Jur. 281.)

A testator gave 19,000*l.* Consols to trustees, in trust for E. B. for life, and, after her death, for her children; and, in case she should die without leaving a child, he directed that the trust-fund should be considered as part of his personal estate, and be disposed of in a due course of administration: and he gave the residue of his effects to E. B., her executors and administrators, to and for her and their own use and benefit, she and they paying thereout, all the debts due from him at his decease, together with the expenses of his funeral, the charges of proving and establishing his will and other incidental expenses, and he appointed her his executrix. E. B. survived the testator and died without leaving a child: Held that, thereupon, the trust-fund did not become undisposed of, but formed part of the testator's residuary estate, and belonged, as such, to E. B.'s estate.

Masters v. Hooper (1) observed upon.

WILLIAM WHITE, by his will, gave 19,000*l.* Consols and 1,000*l.* East Indian Stock to trustees in trust for the separate use of Elizabeth Bowell for life, and, after her death, for her children;

(1) 4 Br. C. C. 207.

1844.
March 6.
SHADWELL,
V.-C.
[35]

SCOTT
F.
MOORE.

and in case she should happen to depart this life without leaving any child of her body lawfully begotten, then he directed that those two sums should be considered as part of his personal estate and effects, and should be disposed of in a due course of administration: and, after making some other bequests, he gave all the rest, residue and remainder of his estate and effects whatsoever and wheresoever, which he should be possessed of, interested in or entitled to at the time of his decease, unto Elizabeth Bowell, her executors and administrators, to and for her and their own use and benefit, she and they paying thereout all such debts and sums of money as should be justly owing from him, at the time of his decease, to any person or persons, together with the expenses of his funeral, the charges of proving and establishing his will and other incidental expenses: and, lastly, he appointed Elizabeth Bowell sole executrix of his will.

After the testator's death, Elizabeth Bowell married and died without leaving any child.

- [36] The 19,000*l.* Consols and 1,000*l.* East India Stock were claimed, by the testator's widow and his next of kin, under the direction that, in case Elizabeth Bowell should die without leaving any child, those two sums should be considered as part of the testator's personal estate and effects and be disposed of in a due course of administration; and by the personal representative of Elizabeth Bowell, as having become part of the testator's residuary estate.

Mr. Stuart and *Mr. Parry* for the plaintiffs, who were some of the testator's next of kin. * * *

- [37] *Mr. Cooper* and *Mr. Glasse*, for defendants in the same interest as the plaintiffs, [cited *Long v. Blackall* (1); *Masters v. Hooper* (2)].

Mr. Bethell and *Mr. Kenyon*, for other defendants in the same interest as the plaintiffs, [cited *Doe v. Sanders* (3); *Clapton v. Balmer* (4); *Jones v. Colbeck* (5); *Briden v. Hewlett* (6); and other cases].

- [38] *Mr. Wakefield*, *Mr. K. Parker*, *Mr. Bromehead*, *Mr. Rogers*, *Mr. Wright*, and *Mr. Faber* appeared for other parties in the same interest as the plaintiffs.

(1) 4 R. R. 73 (3 Ves. 486).

(2) 4 Br. C. C. 207.

(3) Cowp. 420.

(4) 51 R. R. 287 (10 Sim. 426).

(5) 6 R. R. 207 (8 Ves. 38).

(6) 39 R. R. 146 (2 My. & K. 90).

Mr. Walker and Mr. Stinton, for the testator's widow. * * *

SCOTT
v.
MOORE.

Mr. Lowndes and Mr. E. F. Smith appeared for the defendant Moore, the personal representative of Mrs. Bowell; but the VICE-CHANCELLOR decided the case without hearing them.

THE VICE-CHANCELLOR :

[39]

My opinion is against the claim made by the widow and next of kin of the testator.

The only legitimate mode of construing a will, is to take the words of it in their natural sense, unless you are compelled to give them a different meaning.

It is important to observe that the characteristic of this will is tautology and verboseness. (His Honour here read several passages from the will, which showed, as he said, that the testator delighted in an exuberance of words.) The question which I have to decide, is what effect ought to be given to the direction that, in case Elizabeth Bowell should depart this life without leaving any child of her body lawfully begotten, the 19,000*l.* Consols, and 1,000*l.* East India Stock should be considered as part of the testator's personal estate and be disposed of in a due course of administration. All the argument that I have heard insists that, in the event spoken of, those sums shall not go in a due course of administration: for it has been contended that they are not applicable to the payment of the testator's funeral and testamentary expenses, debts and legacies, and that the surplus is not to go according to the will.

If, however, I were to say that these sums are not liable to the payment of debts &c., I should contradict the very words of the will. And I can not see how the direction that, in a given event, certain sums shall be considered as part of the testator's personal estate and effects and be disposed of in a due course of administration, is to be taken to mean, in the first place, that they shall not go in a due course of administration, and, in *the next place, that the subsequent gift of all the rest, residue and remainder of the testator's estate and effects, shall not include them. In my opinion the only way by which effect can be given to the direction, is to say that the residuary gift does include the two sums; for then they will go in a due course of administration, that is to say, they will be liable to be applied in payment of the debts and sums of money justly owing from the testator at his decease, the expenses

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v.
MOORE.

of his funeral, the charges of proving and establishing his will and other incidental expenses; and, subject to that liability, they will go to Elizabeth Bowell, the residuary legatee; and, as she is dead, her personal representative is entitled to them.

I do not think that the case of *Masters v. Hooper* was rightly decided. The testator in that case directed that, after the death of Jonathan Hooper, his great nephew, the rest and residue of his estate should be divided amongst all his relations, share and share alike: and, Jonathan Hooper having died, Lord THURLOW held that there was an intestacy as to the residue, and that it was divisible according to the Statute of Distributions. But, under that statute, the division of an intestate's estate is not made share and share alike. For instance; if an intestate leaves a brother and five nephews, the children of a deceased brother, the brother takes one-half of his residue, but each of the nephews takes only one-tenth of it (1).

1844.
Feb. 29.
March 1.

SHADWELL,
V.-C.
[48]

MILROY v. MILROY.

(14 Simons, 48—55; S. C. 13 L. J. Ch. 266; 8 Jur. 234.)

A testator gave his real and residuary personal estate, in trust to pay an annuity to his nephew, and, subject thereto, in trust for his daughter for life, remainder in trust to pay the income for the maintenance of all and every such child or children as she might leave at her decease, during his, her or their minority; and, when the youngest should have attained twenty-five, to pay, assign and transfer the income, together with the principal, to the children, the same to be divided equally between them, share and share alike; but if any of them should die leaving a child or children who should attain twenty-one, then to pay and assign the share of such child to such his or their child or children: and the testator then expressed his further will to be that his trustees should, immediately after his nephew's decease, convey, release and assign all his freehold and leasehold estates unto the heir or heirs who should be legally entitled thereto; and, in case his daughter should leave no child or children, or they should die under age and unmarried, then in trust to pay and assign the income together with the whole residue unto and equally between his next of kin. The daughter left five children living at her death, all of whom attained twenty-five.

Held that the trust for them was not void for remoteness, but that they took vested interests in the trust-property on their mother's death.

JOHN FRY, by his will dated the 30th June, 1807, after directing all his just debts, funeral expenses and the charges of proving his will to be paid, and giving some specific legacies, gave and bequeathed as follows: "I give and bequeath unto my son-in-law Thomas Milroy and my friends Thomas Seymour and Augustine

(1) See *Elmsley v. Young*, 39 R. R. 353 (2 My. & K. 780).

Hill, all those my several freehold and leasehold messuages or tenements, with the appurtenances thereto belonging, situate, lying and being in the county of Middlesex or elsewhere, and also all and every my ready money, money in the funds, debts, goods, chattels and personal estate whatsoever and wheresoever, due, owing or belonging to me, at the time of my decease, by or from any person or persons whomsoever, to hold the same unto the said Thomas Milroy, Thomas Seymour and Augustine Hill, their heirs, executors and administrators, upon the trusts and to and for the several uses, ends, intents *and purposes hereinafter mentioned, that is to say, upon trust that they, my said trustees or the survivor of them &c. do and shall, from time to time during the natural life of my nephew, William Fry, son of my brother George Fry, receive the rents and issues and profits which shall accrue or arise from my said freehold and leasehold estates, and also shall and do, as soon as conveniently may be after my decease, collect, get in and receive all such debts, sum and sums of money as shall be due, owing, payable or belonging unto me at the time of my decease, and also convert and turn into ready money all my goods, chattels and personal estate not hereinbefore disposed of or consisting of ready money, and, as soon as the same shall be so converted and turned into ready money as aforesaid, that they, my said trustees or the survivor of them &c. shall and do place out and invest the money arising therefrom or from any part of my said personal estate so to be converted and turned into ready money as aforesaid, together with my ready money which shall be remaining after my said debts, funeral expenses, and the charges of proving this my will, shall have been fully paid and satisfied, in the public funds or upon Government or some other good and sufficient security; and that they, my said trustees or the survivor of them &c. shall and do, in the next place, for and during the natural life of my said nephew William Fry, pay unto him, my said nephew, or to whom he shall or may direct or appoint to receive the same, the clear, yearly sum of 20*l.*, to be paid and payable quarterly, the first quarterly payment thereof to be considered as due and to be paid on the day of my death; and also that they, my said trustees, or the survivor &c. shall and do, from time to time during the natural life of my daughter Sarah Milroy, the wife of the said Thomas Milroy, pay, *unto my said daughter, the residue of the interest which shall or may accrue or arise from the money to be placed out upon Government or other security or securities, as well as the rents

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[*49]

[*50]

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and profits which shall accrue or arise from my said freehold and leasehold estates, by half-yearly payments, the first half-yearly payment thereof to begin and be made six months from the time of my decease, and which payment to my said daughter I will shall be free and independent of her present or any future husband or husbands with whom she shall or may intermarry, and her receipt or receipts alone, from time to time, shall be good and sufficient discharge and discharges for the same; and, from and immediately after the decease of my said daughter, in trust to pay the interest of such residue and rents and profits, for and towards the maintenance and education of all and every such child or children as she shall or may leave at her decease, during his, her or their minority; and, when and as soon as the youngest of her child or children shall have attained the age of twenty-five years, upon trust to pay, assign and transfer the dividends and interest of all such residue and rents, together with the principal money as shall or may be remaining after reserving sufficient to pay and discharge the said annuity of 20*l.* unto my said nephew in case he shall be living, the same to be divided equally between them share and share alike; and, from and immediately after the decease of my said nephew, in trust to pay and assign the remainder of the said interest of such residue and rents, unto her children in like manner; and, in case there shall be but one child, then upon trust to pay and assign the same in like manner to such one child; but, in case it shall happen that any or either of my said daughter's children shall die leaving a child or children who shall live to attain the age of twenty-one years, then upon trust to pay and assign the *share of such child so dying, in like manner, to such his or their child or children: and it is my further will and meaning that my said trustees or the survivor &c. shall and do, from and immediately after the decease of my said nephew and the trusts hereof are fully carried into execution, convey, release, and assign all and every my said freehold and leasehold estates unto the heir or heirs who shall be legally entitled to the same; to hold the same unto him, her or them so entitled, his, her, or their heirs and assigns for ever: and in case my said daughter shall leave no child or children, or they should die under age and unmarried, then upon trust and in like manner to pay and assign the said interest and rents and profits, together with the whole residue, unto and equally between my next of kin, share and share alike, reserving nevertheless sufficient to satisfy and discharge the said annuity of 20*l.* to my said nephew

[*51]

while living;" and the testator appointed the trustees to be the executors of his will.

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MILROY.

The testator, by a codicil, dated in September, 1811, revoked the appointment of Thomas Seymour to be one of the trustees and executors of his will, but confirmed his will in all other respects; and died, shortly afterwards, leaving his daughter, Sarah Milroy, his only child, his heir and next of kin. Thomas Milroy, her husband, was the only acting executor and trustee of the will.

Sarah Milroy (who died in 1823) had five children, the youngest of whom, William Fry Milroy, the plaintiff in the suit, attained twenty-five in 1829; and all of them, except John, the eldest child, were still alive and were defendants in the suit. John died in 1838: the defendant Andrew Haigh Milroy was his personal *representative, and the infant defendant Sarah Laura Milroy, his daughter, was his heir and sole next of kin. Andrew Haigh Milroy was also the personal representative of Sarah Milroy.

[*52]

The bill prayed that the rights and interests of all parties under the will, might be declared, and that the trusts, so far as they remained to be performed, might be carried into execution under the decree of the Court, the plaintiff submitting that, according to the true construction of the will, he was entitled to one-fifth of the trust property, subject to the payment of the annuity of 20*l.* to William Fry the testator's nephew.

Mr. Wakefield and *Mr. Lovat* appeared for the plaintiff; and

Mr. Rogers, *Mr. Kinglake* and *Mr. Randell* for the defendants in the same interest, [cited *Jackson v. Marjoribanks* (1); and contended that the children took vested interests in the property on their mother's death: *Farmer v. Francis* (2); *Ellis v. Maxwell* (3); *Blackwell v. Bull* (4); and *Home v. Pillans* (5)].

Mr. Stuart and *Mr. T. H. Hall*, for the infant defendant Sarah Laura Milroy, said that a gift to children when and as soon as the youngest of them should have attained twenty-five, was, clearly, too remote; * * that the case of *Jackson v. Marjoribanks* was plainly distinguishable from the present; for, here, the trust was to convey, not to one child only but to a class of children. * * *

[53]

(1) 56 R. R. 21 (12 Sim. 93).

(3) 52 R. R. 235 (3 Beav. 587).

(2) 27 R. R. 570 (2 Bing. 151, and 2 Sim. & St. 505).

(4) 44 R. R. 52 (1 Keen, 176).

(5) 39 R. R. 116 (2 My. & K. 15).

MILROY THE VICE-CHANCELLOR :

MILROY. I do not want to hear the reply.

[*54]

The will is a very strange and bewildering one : and I have read it over, two or three times, in order to *ascertain what the testator meant ; for I never like to put a forced construction upon the words which a testator has used. I think however, that when you have read over the whole of the instrument, it is perfectly plain that the testator did not mean that anything should go over to the ultimate takers, unless his daughter should leave no child or children, or they should die under age and unmarried. That is perfectly plain.

The question is, can it be reasonably inferred, from the language of this will, that the testator has given his real and personal estate, in the events that have happened, to the children of his daughter ? Now, with respect to the freehold and leasehold estate, the point seems to me to be perfectly plain ; because the testator says : “ And it is my further will and meaning that my said trustees, or the survivor of them, or the executors or administrators of such survivor, shall and do, from and immediately after the decease of my said nephew, and the trusts hereof are fully carried into execution, convey, release and assign all and every my said freehold and leasehold estate, unto the heir or heirs who shall be legally entitled to the same.” There the words : “ heir or heirs,” evidently mean the children of the daughter : and no other construction can be put on them ; because the sentence that immediately follows, is : “ and in case my said daughter shall leave no child or children, or they shall die under age and unmarried, then upon trust, and in like manner, to pay and assign the said interest and rents and profits, together with the whole residue, unto and equally between my next of kin.” So that it seems to me that the testator has put his own construction upon the words, “ heir or heirs : ” and that must settle the question as to the freeholds and leaseholds.

[55]

As to the general personal estate, my opinion is that the word “ minority,” means the time that would elapse before the youngest child attained twenty-five : I say so, because the testator has made a distinction between the word “ minority,” and the words “ under age.” For, in two of the passages subsequent to that which contains the word “ minority,” we have, first, the expression : “ In case it shall happen that any or either of my daughter’s children shall die leaving a child or children who shall live to attain the age of twenty-one years : ” and, afterwards, we have the expression : “ under age and unmarried.” And I must also observe that, in that very

sentence which contains the expression to which I have first adverted, the testator says : " But, in case it shall happen that any or either of my said daughter's children shall die leaving a child or children who shall live to attain the age of twenty-one years, then upon trust to pay or assign the share of such child so dying ;" that is, the child's share ; which presupposes that the testator had given the share to the child ; whereas it was said that he had not done so. And it appears to me that the proper construction of the sentence with which the disposition to the children commences, is that the trustees were to pay the rents and profits to the children during their minority, that is, until they attained twenty-five, for one purpose, and, when they came to that age, to them generally ; that is : " I give my property to them ; but, until the youngest attains twenty-five, the rents are to be paid to them for the purposes merely of maintenance and education." So that the whole meaning is made reasonably clear.

MILROY
v.
MILROY.

Declare that, on the decease of the testator's daughter, Sarah Milroy, her five children took absolute vested interests in the testator's real and residuary personal estate.

WILTSHIRE v. RABBITS (1).

(14 Simons, 76—77 ; S. C. 13 L. J. Ch. 284 ; 8 Jur. 769.)

An annuity charged by will upon leasehold property bequeathed by the will to trustees is in the nature of a chattel interest in land and not of a chose in action, and consequently the priority of successive incumbrancers upon the annuity is not dependent upon notice to the trustees.

GEORGE RABBITS, by his will dated the 9th of August, 1822, bequeathed to Cicero Rabbits and George Bethell, certain farms (held by him for terms of years determinable with the lives of certain persons) upon trust as therein mentioned : and, first, he charged the farms with the payment of annuities, namely, an annuity to his wife, since deceased, for her life, and another annuity of 45*l.* to his daughter Frances, the wife of Thomas Tovey, yearly and every year during all the testator's interest therein, for her separate use (2).

The testator died soon after the date of his will.

By an indenture dated the 30th of June, 1836, Mr. and Mrs.

(1) *Taylor v. London and County Banking Co.* [1901] 2 Ch. 231, 70 L. J. Ch. 477, 84 L. T. 397, C.A. But the right to a sum of money raisable out of land by sale is a chose in action ; see *Foster v. Cockerell*, 39 R. B. 24,

and the cases there referred to in a note.—O. A. S.

(2) The brief, with which alone the reporter was furnished, did not contain any of the trusts of the will, except those stated in the text.

1844.
March 27.
SHADWELL,
V.-C.
[76]

WILTSHIRE
v.
RABBITS.

Tovey assigned the annuity to Thomas Wiltshire, his executors &c., by way of mortgage, with a power of sale, for securing 500*l.* and interest; but, some years prior thereto, they had made a similar assignment to Thomas Munday. The plaintiffs, however (who were Wiltshire's executors), claimed priority over Munday, on the ground that Wiltshire gave the trustees of the will notice of his security, long before Munday gave them notice of his security.

[*77] *Mr. Bethell* and *Mr. Rogers*, for the plaintiffs, said that Mrs. Tovey's annuity, was assignable, not at common *law, but only in equity, and, therefore, it was a chose in action; and, as Wiltshire had taken his security without any notice of Munday's security, and had been beforehand with Munday in giving the trustees notice of it, he had gained priority over Munday, according to *Dearle v. Hall* and *Loveridge v. Cooper* (1). They cited also *Foster v. Blackstone* (2).

Mr. Tripp, for Munday's executors, said that the plaintiffs' counsel had founded their argument on the assumption that the annuity was a chose in action; but that it was, in fact, a rent-charge (3); and therefore the case was within the principle of *Jones v. Jones* (4), and not of *Dearle v. Hall* and *Loveridge v. Cooper*.

Mr. Speed appeared for Mrs. Tovey.

Mr. Stuart, *Mr. Follett* and *Mr. W. Rudall* were counsel for the other defendants.

The VICE-CHANCELLOR, having said, in the course of the argument, that the annuity was an annuity for years, charged on leaseholds which were devised to trustees, delivered judgment as follows:

[*78] It is important to keep up the distinction between choses in action and chattel or freehold interests: and my opinion is that the effect of this will was to pass the legal interest in the leasehold estates to the trustees, *in trust for the testator's son for life, with remainder to his children (5); but charged with an annuity of 45*l.* a year for the separate use of Mrs. Tovey; and that that is a chattel interest in equity, and not a chose in action, nor subject to any of the rules established with regard to assignments of choses in action. The

(1) 27 R. R. 1 (3 Russ. 1).

(2) Affirmed on appeal to the House of Lords under the title of *Foster v. Cockerell*, 39 R. R. 24 (3 Cl. & Fin. 456).

(3) The bill stated that the farms charged with the annuity, were held

by the testator under leases for lives. The fact was, that the leases were for years, determinable on lives.

(4) 42 R. R. 249 (8 Sim. 633).

(5) These trusts were omitted in the bill.

consequence is that the person who took the first security, is entitled to priority over the person who took the second, notwithstanding the latter may have been beforehand with the former, in giving the trustees notice of his security.

WILTSHIRE
v.
RABBITS.

With respect to the case of *Foster v. Blackstone*, the facts were these. The Duke of Marlborough and his son, the Marquis of Blandford, having conveyed certain estates to trustees in trust to raise money for payment of the Marquis's debts, and, subject thereto, in trust for the Duke for life, and, after his death, in trust for the Marquis in fee, the Marquis granted certain annuities to Foster and others, and charged his interest in the estates, and in the surplus of the monies to be produced by the sale of them, with the payment of the annuities. He then borrowed a sum of stock from Sir Charles Cockerell, and assigned, to Sir Charles, his interest in the estates and their surplus produce, for securing a retransfer of the stock. The Duke afterwards died. A small part of the estates was sold in his lifetime, and the remainder after his decease; and then, there being a large surplus of the monies produced by the sales, in the hands of the trustees, Sir Charles Cockerell gave them notice of his security (which, at the time, was nothing but an assignment of a chose in action of the Marquis) before Foster and the other annuitants gave the trustees notice of their security; and Sir JOHN LEACH, *M. R., and, afterwards, the House of Lords, held that, thereby, Sir Charles gained priority over the annuitants.

[*79]

Declare that the defendants, the executors of Thomas Munday, are, in respect of their mortgage security of the 19th of March, 1828, entitled to priority over the mortgage security of the plaintiffs.

MONTGOMERY v. CALLAND (1).

(14 Simons, 79—82; S. C. 8 Jur. 436.)

1844.
March 27.
April 1.

In a suit to redeem, against a mortgagee in possession, the defendant, in his answer, set up an unfounded claim to the equity of redemption, and denied that the mortgage had been satisfied, although a balance was due from him when he filed his answer.

SHADWELL
V.-C.

[79]

The Court ordered him to pay the costs occasioned by his claim, and the costs of the suit subsequent to the filing of his answer, and also interest on the balances in his hands since the time when the mortgage was satisfied.

THIS was a suit to redeem a mortgage for securing the repayment of 1,921*l.* with interest, which was created in July, 1780, and

(1) *National Bank of Australasia v. Hope Co.* (1879) 4 App. Ca. 391, 40
United Hand in Hand and Band of L. T. 697.

MONT-
GOMERY
v.
CALLAND.

assigned by a person claiming under the mortgagee to a trustee for the defendant, in November, 1818. The original mortgagee entered into the receipt of the rents of the mortgaged estate in December, 1780, and he and the persons claiming under him, had ever since continued to receive the rents.

The bill, which was filed in Hilary Term, 1829, stated that the principal which was due on the mortgage at the time of the assignment to the defendant's trustee, and all the subsequent interest in respect thereof, had been fully paid or satisfied, or more than paid or satisfied, by the rents received by the defendant.

[*80]

The defendant, in his answer, which was filed in June, 1830, not only denied that allegation, but set up a *claim to the equity of redemption of the mortgaged estate.

The cause was heard in May, 1833; and, the defendant having failed to substantiate his claim, the Court declared the plaintiff to be entitled to the equity of redemption; and directed the Master to take an account of what was due, to the defendant, for principal and interest on the mortgage, and also to take an account of the rents received by the original mortgagee and the persons claiming under him, and ordered the Master to make annual rests, and the costs occasioned by the claim set up, by the defendant, to the equity of redemption, to be taxed and paid by him; and the consideration of further directions and of the rest of the costs of the suit to be reserved until after the Master should have made his report.

It appeared from the report that, when the bill was filed, a balance of 201*l.* was due to the defendant; but that, when he put in his answer, a balance of 49*l.* was due from him.

Under those circumstances, and as considerable expense had been incurred in prosecuting the decree before the Master,

Mr. Spence and *Mr. Chandless*, for the plaintiff, contended, at the hearing for further directions, that the costs of the suit, which had been reserved by the decree, ought to be paid by the defendant, and that he ought to be charged with interest on the balances in his hands from the time when the mortgage was satisfied. [They cited *Quarrell v. Beckford* (1); *Binnington v. Harwood* (2); *Wilson v. Metcalfe* (3); *Detillin v. Gale* (4); *Archdeacon v. Bowes* (5); *Cliff v. Wadsworth* (6), and other cases.]

(1) 16 R. R. 214 (1 Madd. 269).

(2) 24 R. R. 106 (T. & R. 477).

(3) 25 R. R. 128 (1 Russ. 530).

(4) 6 R. R. 192 (7 Ves. 583).

(5) 28 R. R. 685 (13 Price, 353).

(6) 60 R. R. 294 (2 Y. & C. C. C. 598).

Mr. Wakefield and Mr. James Parker, for the defendant, [cited *Wilson v. Cluer* (1); *Pride v. Fooks* (2); *Harvey v. Tebbutt* (3), and other cases].

MONT-
GOMERY
v.
CALLAND.

[81]

Mr. Stuart appeared for the trustee of the mortgage.

THE VICE-CHANCELLOR :

At the time when the defendant put in his answer, that is, in June, 1830, he denied that the principal and interest due on the mortgage had been satisfied. It appears, however, from the Master's report, that, at that time, there was nothing due on the mortgage. So that, ever since the answer was put in, the cause has been continued, virtually, on a false suggestion in the answer. Therefore, my opinion is that the defendant, Calland, ought to be allowed the costs remaining to be paid, up to and including the putting in of his answer; but that he ought to pay the costs from the time when he put in his answer, including the costs of the trustee; that is, the plaintiff must pay the trustee's costs in the first instance, and be repaid them by the defendant.

With respect to the balances, it seems to me that, as there has been improper conduct on the part of Calland (for he has been receiving what was, in fact, the plaintiff's money, and on a false suggestion), the right thing to do is to refer it back to the Master to compute interest at 4l. per cent., upon the balances in his hands since the mortgage was paid off.

[82]

WARD v. TRATHEN.

EX PARTE BAILEY.

(14 Simons, 82; S. C. 8 Jur. 303.)

After the purchaser of an estate sold under a decree, had approved of the title, a deed was discovered which showed that the plaintiffs could not make a title to more than a moiety of the estate.

The Court discharged the purchaser from his purchase.

AFTER all the objections made, by a purchaser, to the title to an estate sold under the decree in this cause, had been removed, a deed was discovered from which it appeared that the plaintiffs were unable to make a title to more than a moiety of the estate. Whereupon the purchaser presented a petition praying to be discharged

1844.

March 29.

SHADWELL,
V.-C.

[82]

(1) 52 R. R. 65 (3 Beav. 136).

(3) 21 R. R. 145 (1 Jac. & W. 197).

(2) 50 R. R. 227 (2 Beav. 430).

WARD
 TRATHEN.

from his purchase, to have his purchase-money (which he had paid into Court) repaid to him, together with his costs incurred in consequence of the purchase.

Affidavits were made, in opposition to the petition, stating that the plaintiffs had only recently heard of the existence of the deed, and tending to impeach its validity on the ground of its being defaced and the seals removed from it.

The VICE-CHANCELLOR, however, made an order according to the prayer of the petition.

Mr. Stuart and Mr. Spurrier supported the petition.

Mr. Willcock opposed it.

IN RE PARK.

(14 Simons, 89—91.)

1844.
 April 22.

SHADWELL,
 V.-C.
 [89]

A testator gave part of his property to A., B., C. and D. upon certain trusts, for the benefit of his children, and gave the guardianship of them to his wife and his trustees, A., B., C. and D., who were to maintain and educate them out of the trust-property. By a codicil, reciting that he had appointed A., B., C. and D. executors and trustees of his will, he revoked the appointment so far as regarded B., C. and D., and, in lieu of them, appointed E. and F. to act as trustees and executors of his will along with A. :

Held, that the appointment of B., C. and D. to act as guardians to the children, jointly with A., remained unrevoked.

JAMES PARK devised part of his real and personal property to G. S. Petty, C. Kennedy, G. Huddleston and T. Park, upon certain trusts for the benefit of his children, and, afterwards, expressed himself as follows : “ I give the guardianship and tuition of all my children to my wife and my trustees, the said G. S. Petty, C. Kennedy, George Huddleston and T. Park, who are to educate them suitable to their prospects or estate, and suitable sums are to be applied, out of the trust estate, for *their maintenance and education. I appoint the said G. S. Petty, C. Kennedy, G. Huddleston and T. Park executors of this my will.”

The testator made a codicil in the following words : “ Whereas I, the undersigned James Park, in and by my last will, have appointed G. S. Petty, C. Kennedy, G. Huddleston and T. Park trustees and executors thereof; now I do, hereby, revoke such appointment so far as regards C. Kennedy, G. Huddleston and T. Park, and, in lieu of the said C. Kennedy, G. Huddleston and

T. Park, have and do hereby appoint George Mason and John Slater, their heirs, executors and administrators, to act as executors and trustees of my said will along with the said G. S. Petty, in the same manner and with the same or equal powers as if they, the said G. Mason and J. Slater, had been originally appointed trustees and executors of my said will."

In re
PARK.

At the hearing of a petition, presented by the testator's infant children, to have it declared who were their guardians, the question was whether the codicil had the effect of revoking the guardianship of Kennedy, Huddleston and Park, as well as their trustee and executorship.

Mr. Walker and Mr. Stinton, in support of the petition. * * *

Mr. Bethell and Mr. Bacon appeared to oppose the petition ;
but,

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THE VICE-CHANCELLOR, without hearing them, said :

The testator first devises real and personal property to Petty, Kennedy, Huddleston and Park, upon certain trusts for the benefit of his children ; and then by a separate clause, he appoints his wife (who was not a trustee) and his trustees, whom he mentions by their names and not merely as his trustees, to be the guardians of his children ; and, afterwards, he appoints Petty, Kennedy, Huddleston and Park to be the executors of his will. Then, by a codicil, after noticing that he had appointed Petty, Kennedy, Huddleston and Park trustees and executors of his will, he revokes that appointment so far as regards Kennedy, Huddleston and Park, and appoints Mason and Slater executors and trustees in their place. Therefore it is plain that, in the codicil, he has entirely passed over the guardianship ; and I shall declare that, according to the true construction of the will and codicil, the testator's widow and the four gentlemen named in his will, are the guardians of the children.

1844.
May 4.

BOWDEN v. LAING (1).

(14 Simons, 113—115.)

SHADWELL,
V.-C.
[113]

A testator directed his residue to be converted into money, and his wife to receive the interest of it, for the maintenance of herself and children ; and, at her death, he bequeathed the whole, share and share alike, to all the children she might have by him. The testator left a son and a daughter. Some years after his death, the daughter married : Held that, thereupon, her right to maintenance ceased.

RICHARD MILLER made his will, dated the 4th of March, 1817, in the following words :

"I do hereby will and bequeath to my wife, Charlotte Miller, the whole of my property during her natural life: the property to be converted into money as soon as convenient after my decease, at the discretion of Mr. Thomas Black, my executor ; of which my wife, Charlotte Miller, is to receive the interest, for the maintenance of herself and children ; and, at her death, I bequeath the whole, share and share alike, to all the children she may have by me."

The testator died shortly after the date of his will, leaving his wife and two children, a son and daughter, him surviving.

The residue of the testator's estate, after payment of his debts and funeral and testamentary expenses, was invested, by Black, in the purchase of 3,200*l.* stock, in his own name.

The testator's widow married Stephen Bowden, who died in 1824.

Black paid the dividends of the stock to Mrs. Bowden, until the 21st of March, 1827 ; when he transferred the capital into the names of himself and three other persons upon the trusts of the will, and the trustees thenceforth paid the dividends to Mrs. Bowden.

[114] Thomas Richard Miller, the testator's son, died in 1837, having bequeathed all his property to his mother, Mrs. Bowden. In May, 1838, the testator's daughter married Henry Laing. In November of the same year, Mrs. Bowden mortgaged her interest in the stock under the wills of the testator and her son, to Alfred Rooker.

The bill was filed by Mrs. Bowden and Rooker, against the trustees of the stock and Mr. and Mrs. Laing, praying that what was due to Rooker, on his security, might be raised and paid out of a moiety of the stock ; and that the trustees might be decreed to pay the residue of such moiety to Mrs. Bowden, and also to pay to her the dividends of the other moiety during her life.

Mr. and Mrs. Laing, by their answer, submitted to the judgment

(1) *Wilkins v. Jodrell* (1879) 13 Ch. D. 564, 49 L. J. Ch. 26, 41 L. T. 649.

of the Court, whether what was due to Rooker, ought to be raised and paid out of one moiety of the stock, and whether the trustees ought to be directed to transfer the residue of that moiety, to Mrs. Bowden, for her own use and benefit, and to pay, to her, the dividends of the other moiety, for her life.

BOWDEN
v.
LAING.

The question was whether Mrs. Laing, who was admitted to be living with her husband, was entitled to maintenance under her father's will.

Mr. Bethell and *Mr. F. T. White*, for the plaintiffs, said that, by the father's will, the income of his residuary estate, was given, to his wife, for the maintenance of herself and her children, and that she was bound to maintain them so long as they formed part of her family; but that, when they were foris-familiated, their *right to maintenance ceased altogether: *Thorp v. Owen* (1).

[*115]

Mr. Webster, for Mr. and Mrs. Laing, said that the will contained a positive direction for the maintenance of the children, and, therefore, Mrs. Laing was entitled to maintenance notwithstanding she was married and living with her husband. [He cited *Gilbert v. Bennett* (2); *Longmore v. Elcum* (3); *Ellis v. Maxwell* (4); *Pride v. Fooks* (5); *Soames v. Martin* (6); *Kilvington v. Gray* (7); *Raikes v. Ward* (8); *Crockett v. Crockett* (9).]

Mr. Willcock appeared for the trustees of the stock.

THE VICE-CHANCELLOR:

When the income of property is given, as it is in this case, to the mother, for the maintenance of herself and her children, what is intended is that she shall receive the whole of the income, and shall maintain the children out of it so long as they form part of her family. But when they are foris-familiated, they lose the right to maintenance. Consequently Mrs. Laing's right to be maintained out of the trust fund, ceased on her marriage; and her mother is entitled to be paid the dividends of one moiety of that fund, during her life, and to have the residue of the capital of the other moiety, after payment of what is due to Rooker, transferred to her absolutely.

- (1) 62 R. R. 253 (2 Hare, 607).
- (2) 51 R. R. 268 (10 Sim. 371).
- (3) 60 R. R. 192 (2 Y. & C. C. C. 363).
- (4) 52 R. R. 235 (3 Beav. 587).
- (5) 50 R. R. 227 (2 Beav. 430).

- (6) 51 R. R. 249 (10 Sim. 287).
- (7) 51 R. R. 250 (10 Sim. 293).
- (8) 58 R. R. 131 (1 Hare, 445).
- (9) 58 R. R. 135 (1 Hare, 454).

1844.

June 7.

SHADWELL,
V.-C.

[125]

FOLLETT v. TYRER (1).

(14 Simons, 125—128; S. C. 13 L. J. Ch. 441; 8 Jur. 528.)

A husband is not barred of his curtesy out of his wife's equitable estates of inheritance by the fact that a separate use was annexed to the equitable estate during her life.

By the settlement on the marriage of William Hughes with Elizabeth Antrobus, dated in August, 1839, certain freehold estates, the property of the lady, were conveyed unto and to the use of G. E. R. Kenney and his heirs in trust to receive the rents, after the solemnization of the marriage, and to pay the same to Elizabeth Hughes during her life for her separate use, independent of her intended or any future husband; and, after her decease, in trust for such person and persons, for such estate and estates and in such shares and proportions as Elizabeth Hughes, either with or without the consent of her then intended or any future husband, should, by deed or will, appoint, and in default of such appointment, in trust for her right heirs: and Kenney and his heirs were empowered, without the consent or concurrence either of Elizabeth Hughes or her husband, or their or either of their heirs or assigns, or of any other person or persons, to sell the estates at any time thereafter, if he or they should think it proper and expedient so to do, and to lay out the proceeds of the sale in the purchase of other lands, in England or Wales, in fee simple, or on mortgage or in the funds; and such securities were to be held by him and them, upon the trusts aforesaid: and Kenney and his heirs were also empowered, without any such consent or concurrence as aforesaid, to make sales or exchanges of any such *other real estates, or to call in any money invested on any mortgage or mortgages, or other security as aforesaid, with liberty to alter, vary and transpose any such security or securities, from time to time and as often as he or they should think proper: and his and their receipts were to be sufficient discharges for all monies payable to him or them under the trusts aforesaid: and William Hughes covenanted, with Kenney, that all the property, whether real or personal, to which Elizabeth Hughes or he in her right, should become seised or possessed of during the coverture, should be conveyed and assigned unto and to the use of Kenney, or other the trustee or trustees for the time

[*126]

(1) *Cooper v. Macdonald* (1877) L. R. 7 Ch. D. 288, 47 L. J. Ch. 373, 38 L. T. 191; and the husband has a similar right in property acquired by

his wife since the Married Women's Property Act, 1882: *Hope v. Hope* [1892] 2 Ch. 336, 61 L. J. Ch. 441, 66 L. T. 522.—O. A. S.

being of the settlement, upon the trusts thereinbefore expressed, or such of them as should be then subsisting; and that Elizabeth Hughes should be, at all times, independent of him; and that Kenney, his heirs, executors &c., and every trustee to be appointed as thereafter mentioned, should, at all times thereafter, hold, as well the premises thereby conveyed, as also all such after-acquired properties of Elizabeth Hughes, upon the trusts aforesaid, without any interruption from or by William Hughes, his heirs, executors &c., or any person claiming under him.

FOLLETT
c.
TYRER.

Mrs. Hughes died in March, 1841, without having made any appointment of the estates, leaving her husband and one son by him, surviving. The son died, an infant, shortly after his mother; and Robert Jefferson, the son of his maternal uncle, was his heir and also the heir of his mother.

In August, 1841, the defendant Tyrer, who had been appointed a trustee of the settlement in the place of Kenney deceased, sold the estates and received the purchase-money.

The bill was filed in December, 1843, by the assignee of William Hughes under the Insolvent Debtors' Act: and the question was whether William Hughes was entitled to a life interest in the proceeds of the sale of the estates, as tenant by the curtesy of them before they were sold.

[127]

Mr. Rolt, for the plaintiff, [cited *Morgan v. Morgan* (1) and other cases].

Mr. J. V. Prior, for the defendants, said that the estates were settled so as to prevent Mr. Hughes from taking any interest in them; and, therefore, he did not become tenant by the curtesy of them on the death of his wife; nor could he claim any interest in the money for which they had been sold: *Hearle v. Greenbank* (2); *Roberts v. Dixwell* (3).

THE VICE-CHANCELLOR:

This case is precisely similar to *Morgan v. Morgan*.

The legal estate in the settled property was vested in Kenney, in trust for the separate use of Mrs. Hughes, during her life; with remainder for such person or persons as she should appoint; and, in default of appointment, in trust for her right heirs. So that, all along, she was seised, in equity, of the fee simple of the estates,

[128]

(1) 21 R. B. 318 (5 Madd. 408).

(3) 1 Atk. 607.

(2) 3 Atk. 695.

FOLLETT
v.
TYNER.

with power to defeat that seisin either wholly or partially. She did not, however, exercise that power; and, therefore, at her death, she was seised of the equitable inheritance in fee simple, and her husband became equitable tenant by the curtesy of the estates.

After her death, the trustee sold the estates; and, as the settlement directs that the purchase-money shall be invested in the purchase of other lands, or on mortgage or other securities, and that the securities shall be held upon the trusts aforesaid, my opinion is that, from the beginning, the purchase-money was impressed with a trust which made it bear the character of realty. The consequence is that the husband, or rather his assignee, is entitled to the interest of the purchase-money during his life, and, on his death, the principal will belong to the defendant Jefferson, as heir *ex parte maternâ*.

1844.
June 7.

SHADWELL,
V.-C.
[129]

PRATT v. PRATT (1).

(14 Simons, 129—130; S. C. 8 Jur. 507.)

The revocation by further codicil of every gift to the testator's late butler contained in his will does not necessarily revoke a gift of an annuity to that individual by an intermediate codicil given in substitution for the gifts contained in the original will.

HENRY COWPER, Esq., the testator in this cause, by his will dated the 11th of June, 1830, gave to his servant Joseph Faulkner, 150*l*. in addition to a year's wages, which he had bequeathed, to the legatee, in the previous part of his will. By a codicil dated the 19th of February, 1838, he revoked the bequests contained, in his will, in favour of Joseph Faulkner, and, in lieu of them, gave him an annuity of fifty guineas, for his life. By another codicil dated in 1840, the testator expressed himself as follows: "I Henry Cowper, of Tewin Water, in the county of Herts, Esq., do make this further codicil, all written with my own hand, to my last will and testament bearing date the 11th day of June, in the year of our Lord 1830, all written also with my own hand; that is to say, I revoke every gift therein bequeathed to my late butler Joseph Faulkner, both the one year's wages and the further pecuniary legacy of 150*l*."

The testator died in November, 1840.

(1) *Farrer v. St. Catherine's College* (1873) L. R. 16 Eq. 19, 42 L. J. Ch. 809, 28 L. T. 800.

The Master having reported that Faulkner was entitled to the annuity of fifty guineas, the residuary legatees excepted to the report.

PRATT
r.
PRATT.

Mr. Bethell and *Mr. Hubback*, in support of the exception :

Faulkner left the testator's service some time before the date of the second codicil ; and the testator notices that fact ; for he speaks of him as his late butler. The *words : " therein bequeathed " must be applied, not only to the will, but to the codicil also, that is, to all the papers which, collectively, constitute the will. The legacies given by the will, had been revoked by the first codicil : and, therefore, if the second codicil does not revoke the gift of the annuity, it has no operation at all. * * *

[*130]

Mr. Stuart and *Mr. F. S. Williams*, appeared for Faulkner, and

Mr. Anderdon and *Mr. Craig* for the executors.

THE VICE-CHANCELLOR :

This is quite a plain case.

The testator, in his second codicil, not only revokes every gift bequeathed in his will to his late butler, but mentions what those gifts are, namely, a year's wages and a further pecuniary legacy of 150*l*. There being, then, no ambiguity in his language, I cannot say that he meant anything but what he has expressed.

The exception, therefore, must be overruled.

ELBORNE *v.* GOODE (1).

(14 Simons, 165—179 ; S. C. 13 L. J. Ch. 394 ; 8 Jur. 1001.)

The costs of administration are rateably borne by every part of a testator's residuary personal estate whether disposed of by the will or undisposed of.

1844.
June 7, 22.
July 4, 23.
SHADWELL,
V.-C.
[165]

[In this case a question had arisen between the residuary legatees and the next of kin of a testator as to the destination of certain accumulations of the income of the residuary personal estate of the testator made during a period in excess of the time allowed by the Thellusson Act. The question had been determined in favour of the next of kin, and the only remaining point to be decided was how the costs of the suit were to be borne.]

(1) *Trethewy v. Helyar* (1876) 4 Ch. D. 53, 56, 46 L. J. Ch. 125.

ELBORNE THE VICE-CHANCELLOR :

^{c.}
GOODE.
July 23.

[178]

The question in this case as to the costs, seems to have arisen from confounding personal estate specifically bequeathed, with the bequest of residue. The residue of a testator's personal estate, is that portion of it which remains after payment of his funeral and testamentary expenses, debts and legacies, and the costs of suit necessary for the administration of the estate, including all costs and charges occasioned by the will: *Ripley v. Moysey* (1) ; *Nisbett v. Murray* (2). It seems to follow, from that definition, that, whether the residue be wholly given or wholly undisposed of, or partly given and partly undisposed of, whether there be one legatee or more, or one person next of kin or more, the thing that is taken is of the same quality, and the parts which constitute the whole, only come into existence after satisfaction of the general costs of suit ; in other words, the takers of shares, where shares are taken, are liable to the costs in proportion to their shares. This appears to be the rule of the Court shown by the decrees in *Ackroyd v. Smithson*, as stated in *Eyre v. Marsden* (3), in *Roberts v. Walker* (4), and in *Creswell v. Cheslyn* (5). Lord COTTENHAM took the same view in *Eyre v. Marsden* ; and his decision in that case *not only appears to me to be right, but to be precisely in point and to govern the case now before me.

[*179]

The costs, therefore, must be paid, *pro rata*, out of the fund, part of the general residue given by way of executory devise, including the lawful accumulations, and out of the fund, the remainder of the residue which represents the accumulations made void by the statute.

1844.

June 28.

SHADWELL,
V.C.

[202]

WREY v. SMITH.

(14 Simons, 202—212.)

Notwithstanding a testamentary direction to executors to sell with all convenient speed, the tenant for life under the will may claim the income in specie (during the first year) of wasting property remaining unconverted where the will directs the executors to hold the unconverted property upon the same trusts as the converted property.

ARTHUR MILLS RAYMOND the late uncle of the plaintiff Mary Ann Wrey, by his will bearing date the 29th of March, 1843, disposed of his residuary personal estate in the following words :

“ I give and bequeath all my money, securities for money, monies

(1) 44 R. R. 122 (1 Keen, 578).

(4) 32 R. R. 318 (1 Russ. & My. 752

(2) 5 R. R. 6 (5 Ves. 149—158).

—767).

(3) 48 R. R. 73 (4 My. & Cr. 245).

(5) 2 Eden, 123.

WREY
v.
SMITH.

in the public stocks or funds, chattels and all other my personal estate and effects, whatsoever and wheresoever, of or to which I shall be possessed or entitled at the time of my decease, and not by me otherwise disposed of, unto the Rev. John Smith and the Rev. John Tomkyns, their executors, administrators and assigns, upon trust, with all convenient speed after my decease, to sell and convert into money such part or parts *as they or the survivor of them, or the executors or administrators of such survivor, or their or his assigns, shall think proper, of any monies in the funds; and also to call in, sell and convert into money all such parts of the rest of my said general personal estate as shall not consist of money, and upon trust, by and out of my said general personal estate and the monies forming part thereof and to arise thereby, to pay and satisfy all my just debts and my funeral and testamentary expenses, and the legacies hereinbefore given, and the duty payable in respect thereof; and I do hereby declare that the said John Smith and John Tomkyns and the survivor of them, and the executors or administrators of such survivor, and their or his assigns, do and shall lay out and invest the residue of the monies to arise from my said general personal estate which shall remain after answering the purposes aforesaid, in their or his names or name, in the Parliamentary stocks or public funds of Great Britain, or at interest upon Government or real securities in England or Wales, but not in Ireland, and do and shall, from time to time, alter, vary and transpose, at their or his discretion, as well the same stocks, funds and securities, as also such of the stocks, funds or securities, being part of my personal estate, which they or he shall not think proper to sell and convert into money; and I do hereby declare that the said John Smith and John Tomkyns and the survivor of them, and the executors or administrators of such survivor, and their or his assigns, do and shall stand and be possessed of and interested in all the said trust monies, stocks, funds and securities which shall be so purchased as aforesaid, and which shall remain unconverted into money as aforesaid and the interest, dividends and annual produce thereof, upon the trusts and for the intents and purposes and with and subject *to the powers hereinafter expressed or declared and contained of and concerning the same. [The trusts declared were to pay the income thereof "as and when the same should be received" to Mary Ann Wrey for her separate use during her life and after her decease to hold the trust fund for her children.]

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[*204]

WREY
*
SMITH.
[207]

The testator died in April, 1843.

[*208]

The bill stated * * that, amongst other personal estate, the testator died possessed of 799*l.* 0*s.* 1*d.* per annum Long Annuities, 2,000*l.* East India stock, and 28,000*l.* Bank stock; and that the executors received the Midsummer dividends for the year 1843, on the Long Annuities and East India stock, and the dividends, due the 10th of October, 1843, on the Bank stock, and also the dividends, due the 5th of January, 1844, on the East India stock: that, on the 14th of July and the 5th of September, 1843, the executors sold the Long Annuities and invested the proceeds in the purchase of 14,072*l.* 12*s.* 10*d.* three per cent. Consols; and that, on the 9th of February, 1844, they sold the Bank stock and East India stock, and invested the proceeds in the purchase of 60,904*l.* 1*s.* Consols, which several sums of Consols still remained in their names upon the trusts, in the will expressed, concerning the residuary personal estate: that the Long Annuities, East India stock and Bank stock, were not, nor was any part thereof, required for payment of the said testator's funeral and testamentary expenses and debts, *or the legacies or annuities bequeathed by his will. * * *

The bill prayed that the trusts of the will as to the testator's residuary estate, might be carried into effect under the direction of the Court; and that it might be declared that the plaintiff was entitled to such interest as actually accrued upon the testator's clear residuary personal estate, during the first year after the testator's death; or otherwise that it might be declared what interest she was entitled to in respect of such first year, and how such interest ought to be calculated and allowed, and that Smith and Tomkyns might be decreed to pay her the interest to which she should be declared to be entitled.

Mr. Stuart and Mr. Campbell, for the plaintiff, [cited *Angerstein v. Martin* (1) and *Hewitt v. Morris* (2)].

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Mr. K. Parker and Mr. Rolt for the defendants *Mr. and Mrs. Mallock* and their children, [cited *Dimes v. Scott* (3) and other cases]. They added that the utmost that the plaintiff could claim with respect to the improperly invested residue, was the income which it would have produced if it had been in a proper state of investment at the testator's death.

(1) 24 R. B. 32 (T. & R. 232).
(2) 24 R. B. 39 (T. & R. 241).

(3) 27 R. B. 46 (4 Russ. 195).

Mr. Law appeared for the executors and trustees.

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v.
SMITH.

Mr. Stuart, in reply, cited *Douglas v. Congreve* (1). * * *

THE VICE-CHANCELLOR :

[210]

This case must be decided not with reference to the authorities (which are somewhat conflicting), but in accordance with the language which the testator has used.

He gives all his money, securities for money, monies in the public stocks or funds, chattels and all his other personal estate and effects, whatsoever and wheresoever, of or to which he should be possessed or entitled at the time of his decease, and not by him otherwise disposed of, to Smith and Tomkyns, upon trust, with all convenient speed after his decease, to sell and convert into money such part or parts, as they or the survivor of them, or the executors or administrators of such survivor or their or his assigns should think proper, of any monies in the funds; and also to call in, sell and convert into money all such parts of the rest of his said general personal estate as should not consist of money; and upon trust, by and out of his said general personal estate and the monies forming part thereof and to arise thereby, to pay and satisfy all his just debts and his funeral and testamentary expenses, and the legacies thereinbefore given and the duty payable in respect thereof. And then he declares that Smith and Tomkyns and the survivor of them, and the executors or administrators of such survivor, and their or his assigns, do and shall lay out and invest the residue of the monies to arise from his said general personal estate, which shall remain after answering the purposes aforesaid, in *their or his names or name, in the Parliamentary stocks or public funds of Great Britain, or at interest upon Government or real securities in England or Wales, but not in Ireland, and do and shall, from time to time, alter, vary and transpose, at their or his discretion, as well the same stocks, funds and securities, as also such of the stocks, funds or securities, being part of his personal estate, which they or he shall not think proper to sell and convert into money.

[211]

Now I do not understand that those words give the trustees an option, generally, as to what parts of the testator's residuary estate they shall sell and convert into money, and what parts they shall leave unsold and unconverted; but the first direction to them is to sell and convert the whole into money, with all convenient speed :

(1) 44 B. R. 103 (1 Keen, 410).

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c.
SMITH.

so that they are to exercise a discretion as to what is convenient speed.

Then they and the survivor of them, and the executors or administrators of such survivor, and their or his assigns, are to stand possessed of and interested in all the testator's said trust-monies, stocks, funds and securities which shall be so purchased as aforesaid, and which shall remain unconverted into money as aforesaid, and the interest, dividends and annual produce thereof, upon trust that they and the survivor of them and executors or administrators of such survivor, and their or his assigns, do and shall, during the life of the plaintiff, pay the said interest, dividends and annual produce of the said trust-monies, stocks, funds and securities, as and when the same shall be received, unto such person or persons as the plaintiff shall appoint, and, in default of appointment, into her own hands, for her separate use. Therefore it is plain that if *the trustees, having exercised their discretion as to what was a convenient time for selling or converting any part of the testator's residuary estate, have not found such a time, the income of that part belongs to the tenant for life, as well as the income of that part which, in the exercise of their discretion, they have found a convenient time to sell or convert.

[*212]

Declare that the plaintiff is entitled to such interest as actually accrued upon or in respect of the clear residuary personal estate of the testator, for and during the first year after the death of the testator.

1844.
July 6.
SHADWELL,
V.-C.
[214]

JAMES v. SMITH (1).

(14 Simons, 214—217; S. C. 13 L. J. Ch. 376; 8 Jur. 594.)

A testatrix bequeathed as follows: "To my niece, M. M., daughter of my nephew T. M., 30*l*. To A. L. and M. L., son and daughter of my late niece M. L., 30*l*. each." And she gave all the residue of her property, not thereinafter disposed of, unto and equally to be divided amongst all her nephews and nieces. Afterwards she gave a specific legacy to M. L., and described her as her niece: Held that, by the words, "my nephews and nieces" in the residuary bequest, the testatrix meant, not only her nephews and nieces, but their children also.

THE will of the testatrix in this cause, was, partly, as follows :

"I give and bequeath to my brother, Hunter Todd, the sum of 200*l*. To L. Wirth, grandson of my late husband, 30*l*. To my

(1) *Wells v. Wells* (1874) L. R. 18 382, 50 L. J. Ch. 249, 43 L. T. 750; Eq. 504, 43 L. J. Ch. 681, 31 L. T. 16; *Seale-Hayne v. Jodrell* [1891] A. C. *Merrill v. Morton* (1881) 17 Ch. D. 304, 61 L. J. Ch. 70, 65 L. T. 57.

niece Mary Maltus, spinster, daughter of my nephew Thomas Maltus, 30*l*. To Anthony Lock and Mary Lock, son and daughter of my late niece Mary Lock, deceased, 30*l*. each. I give and bequeath the residue of my personal estate not hereinafter by me otherwise disposed of, which shall remain after payment of my debts, funeral and testamentary expenses, and the legacies hereinbefore by me given, unto and equally to be divided between and among all and every my nephews and nieces respectively, and their respective executors, administrators and assigns. I give to Ann, the eldest daughter of the said L. Wirth, one pair of large silver candlesticks. I give, to my god-daughter, Mary James, the youngest daughter of my nephew John James, my gold watch. I give, to the *eldest daughter of my nephew, Hunter Todd, my silver pint mug. I give to the eldest daughter of my nephew Francis Todd, my silver coffee-pot. I give to my said niece Mary Maltus, one pair of silver salt-cellar and two silver table-spoons; and to my said niece Mary Lock, one pair of silver salt-cellar and two silver table-spoons."

JAMES
F.
SMITH.

[*215]

As the testatrix had described two of her great-nieces, Mary Maltus and Mary Lock, as her nieces, one question in the cause was whether all her great-nephews and great-nieces were entitled to share in the residue with her nephews and nieces.

Mr. Bethell and *Mr. De Gez*, for the plaintiffs, two of the nephews and a niece of the testatrix :

* * In the present case two individuals are erroneously described; but it can not be held, consistently with any rule or principle of construction, that an error with respect to two individuals of a class, entitles the whole class to claim under words of general description, which do not apply to them: *Falkner v. Butler* (1); *Shelley v. Bryer* (2); **Hussey v. Berkeley* (3); *Frazer v. Pigot* (4); *Bagley v. Mollard* (5).

[*216]

THE VICE-CHANCELLOR :

I entertain great respect for the opinion of the learned Judge who decided the case of *Frazer v. Pigot*; but I must say that I do not think that it was rightly decided. The case of *Shelley v. Bryer* is unlike this. There the testator spoke of a person as his niece,

(1) Amb. 513.

(2) 23 R. R. 32 (Jac. 207).

(3) Amb. 603.

(4) 34 R. R. 290 (Younge, 354).

(5) 32 R. R. 281 (1 Russ. & My. 581).

JAMES
v.
SMITH.

who, in fact, was his great-niece; but he did not show that he knew her to be the child of either a nephew or a niece. He spoke at random.

Mr. Freeling for defendants in the same interest as the plaintiffs, cited *Charge v. Goodyer* (1).

Mr. Koe, Mr. Willcock, Mr. Shadwell and *Sir W. Riddell*, appeared for other defendants, but were not heard.

THE VICE-CHANCELLOR:

The question is whether the testatrix has not so defined her meaning of the word "niece," as to show that she meant by it, a child of a nephew or niece.

[*217]

She says: "I give to my niece, Mary Maltus, spinster, daughter of my nephew, Thomas Maltus, 30*l.* To Anthony Lock and Mary Lock, son and daughter of my late niece, Mary Lock, deceased, 30*l.* each." Then in a subsequent part of her will, she says: "I give to my said niece Mary Maltus" (whom she had previously described as the daughter of one of her nephews), and: "to *my said niece, Mary Lock," whom she had before described as the daughter of one of her nieces. So that, in three instances, she has described persons as nieces, who, in fact, were the children of a nephew and a niece. Consequently she has shown, unequivocally, that she meant the child of a nephew or a niece, as well as a nephew or a niece.

Mr. Lowndes and *Mr. Mylne* appeared for parties who were the grandchildren of the testatrix's nephews and nieces. The grandfather of one of them (*Mr. Lowndes's* client) was dead at the date of the will, and his father died in the testatrix's lifetime. They contended that their clients were entitled to share in the residue.

THE VICE-CHANCELLOR:

I take the word, "nieces," to mean only what the testatrix shows she intended it to mean, namely, the daughters of her nephews and nieces. If by that word, she meant nieces in the second degree, it necessarily follows that, by the word, "nephews," she meant nephews in the same degree.

Declare that the great-nephews and great-nieces of the testatrix living at her death, are entitled to participate in the residue, and that they take *per capita*.

COOKE *v.* TURNER (1).

(14 Simons, 218—221; S. C. 8 Jur. 703.)

1844.
July 11.SHADWELL,
V.-C.

[218]

A testator, after giving certain benefits to his heir, revoked them in case she should ever dispute his will or his competency to make it, or should not confirm it when required, or should not resist any proceeding by the result of which a greater benefit might be attainable by her than was intended by the will, and the will contained a gift over on forfeiture. A bill against the heir and others, to establish the will and carry the trusts into execution, contained statements, and interrogatories founded on them, relating to the testator's sanity and to the heir having refused to confirm the will.

Held that the heir was not bound to answer any of the interrogatories relating to the testator's sanity, notwithstanding the revocation clause might be invalid, or she might make an admission, in her answer, which would subject her to its operation, if it were valid.

THE testator in the cause directed the trustees of his will to pay an annuity of 2,000*l.* out of the rents of his estates to his daughter (who was his heir-at-law), and the residue of the rents to his wife, during her life, and after the death of either of them, to pay the whole to the survivor; and, subject thereto, he devised his estates to the first and other sons of his daughter, successively, in tail, with remainders over: and if his daughter, or any person in her name or on her behalf, should dispute his will or his competency to make it, or should refuse to confirm it when required so to do by his trustees; or if any proceedings should be taken, at any time, by any person whomsoever, by any possible result of which a greater benefit might be attainable by her than was intended for her by the will, and she should not formally disavow, stay or resist such proceedings to the full extent of her ability, then the testator revoked the annuity and all the other benefits given to her by his will, and directed his trustees to pay her an annuity of 300*l.* only, and, after his wife's death, to accumulate the surplus of the rents, and to stand possessed of the accumulations in trust for the person who should first become entitled to an estate of inheritance in his estates.

The bill was filed by the trustees, for the purpose of establishing the will and having the trusts of it carried into execution. The testator's daughter and certain persons entitled to the estates on her dying without issue, were defendants.

[219]

The bill alleged that the daughter had refused to execute a deed,

(1) The validity of the forfeiture clause in this will was subsequently established at law, as reported in 15 M. & W. 727. Subsequent proceedings in the suit in Chancery are reported in 15 Sim. 611, 16 Sim. 482, and 2 Mac. & G. 18.—O. A. S.

COOKE
r.
TURNER.

which the plaintiffs had required her to execute, for the purpose of confirming the will, and that she had refused so to do on the ground that the testator was *non compos mentis* and incapable of making a will: and it made various statements with a view to show the sanity of the testator at the time when he made his will. * * *

[*220]

The daughter, in her answer, did not admit the alleged will to be the will of the testator, but said that the paper-writing set forth in the bill and therein called the testator's will, was to the effect stated. She admitted *that she had not executed a deed which the trustees had tendered to her; but she did not answer any of the interrogatories which were founded on those statements in the bill, which related to or had any bearing upon the testator's sanity. In consequence of which the plaintiffs excepted to her answer for insufficiency. The Master overruled the exceptions.

At the hearing of exceptions to his report, the question was whether, notwithstanding the clause of forfeiture in the will, the defendant was bound to answer the interrogatories relating to the testator's sanity.

Mr. Stuart and *Mr. Freeling*, in support of the exceptions. * * *

[221]

Mr. Bethell and *Mr. Willcock* appeared to support the report; but

THE VICE-CHANCELLOR, without hearing them, said:

I think that the defendant cannot be compelled to put in a further answer; for it is a very serious question whether she may not incur a forfeiture by answering the interrogatories to which the exceptions relate: and that is not a question which can be satisfactorily decided on the present occasion.

The defendant has answered to a certain extent; and it is now said that she ought to answer more fully. But, where a question of forfeiture is raised, the real question is whether the Court ought to run the risk of putting her in a worse situation with regard to the forfeiture than she was in before. Besides, if the defendant were to answer fully, and the cause were to come on to a hearing, and the counsel for the plaintiffs were then to state that the validity of the will was disputed and that they wanted an issue to try its validity, it would be a matter of course to grant one. On the whole, it seems to me that the defendant ought not to be compelled to put in a further answer.

MEDLEY v. HORTON.

(14 Simons, 222—229; S. C. 13 L. J. Ch. 442; 8 Jur. 853, 949.)

Where a general power of appointment over property is given to a married woman and subject thereto the property is settled to her separate use with a restraint on anticipation, the restraint on anticipation is nugatory and inoperative.

Where an intending mortgagee of personal property, having constructive notice of a *mesne* incumbrance thereon, pays off a prior incumbrance and does not take an assignment of the debt, the intention to extinguish the prior incumbrance may be presumed.

WILLIAM HORTON, by his will, dated the 11th July, 1833, directed his trustees to invest the proceeds of the sale of his real and personal estate, after payment of his debts, funeral and testamentary expenses, in Government or real securities, and to pay and apply the interest, dividends and annual produce of one equal fifth part thereof during the life of his daughter Sarah Duckham, the wife of Joseph Duckham, unto such person or persons as she should, from time to time during her life, whether *coverte* or *sole*, under her hand, authorize and appoint to receive the same, and, in default of such appointment, into her proper hands for her sole and separate use and benefit, independently of her then present or any future husband, and so as to be wholly free and exempt from the debts, control and engagements of any such husband; and he directed that the receipt or receipts of his said daughter or of the person or persons whom she might authorize to receive the same annual proceeds or any part thereof, should alone *be an effectual discharge, to his trustees, for the payment thereof, and that the trustees should always be at liberty to require from his said daughter, a separate authority or receipt, from time to time, for each quarterly payment, it being the intention of the testator that the said annual interest and proceeds should not be sold, charged, or otherwise disposed of.

The testator died in 1833; and, in March, 1840, Sarah Duckham joined in a deed, to which her husband was a party, and, thereby, in order to secure the payment, during her life, of the interest of 2,500*l.* lent by the plaintiff to one of her sons, William Duckham, she, in exercise of the power of appointment given to her by the will, appointed, to the plaintiff, all the interest, dividends and annual produce which, during her life, should grow due in respect of the trust funds which then were or thereafter should become subject to the trusts declared, by the will, in her favour.

The question was whether the appointment was good.

1844.
July 15.SHADWELL,
V.-C.
[222]

[*223]

MEDLEY
v.
HORTON.
[224]

Mr. Walker and Mr. Blower, for the plaintiff, [cited and distinguished this case from *Barrymore v. Ellis* (1), *Brown v. Bamford* (2), and other cases] on the ground that in those cases the restriction applied to the power of appointment; and they relied on *Acton v. White* (3).

Mr. Cooper and Mr. Hubback, for Sarah Duckham, said that, in the present case, the restraining clause followed the gift of the power as well as the gift of the separate estate, and, consequently, applied to the former as well as the latter. * * *

THE VICE-CHANCELLOR :

I will not trouble *Mr. Walker* to reply.

[*225] This case is quite different from *Barrymore v. Ellis*, and *Brown v. Bamford*; and it does not appear to me *that there are here any such words of restraint as would prevent a married woman from appointing by way of anticipation.

The testator first directs the trustees to pay the interest of one-fifth part of his residuary estate, during the life of his daughter, to such person or persons as she should, from time to time, during her life, whether *coverte* or *sole*, under her hand, authorize and appoint to receive the same: that is one part: it is a general power: and, in default of appointment, into her proper hands, for her sole and separate use and benefit, independently of her then present or any future husband, and so as to be wholly free and exempt from the debts, control or engagements of any such husband; and the receipt or receipts of his daughter, or of the person or persons whom she may authorize to receive the same annual proceeds, or any part thereof, are alone to be an effectual discharge to her trustees for the payment thereof. Then these words are added: "and my said trustees shall always be at liberty to require, from my said daughter, a separate authority or receipt, from time to time, for each quarterly payment, it being my intention that the said annual interest and proceeds shall not be sold, charged or otherwise disposed of." So far as the trustees may interfere, it is a different matter: but the point before me is independent of any interference of the trustees; and it seems to me that there is a general power of appointment given; and that, subject to it, the trust money is to be paid to the separate use of the daughter, in

(1) 42 R. R. 77 (8 Sim. 1).
(2) *Ante*, p. 467,

(3) 24 R. R. 203 (1 Sim. & St. 429),

general terms; and there is no restraint as to the receipts to be given; no direction that they shall be for any portion of the dividends; that is, the receipts are not confined to dividends before any certain time, or after any certain time. And my opinion is that the *general words at the end: "it being my intention that the annual interest and proceeds shall not be sold, charged or otherwise disposed of," must go for nothing, as, in fact, there has been a general power given to dispose of the property. According to the well known rule of law, you cannot give a lady a power of disposing of a fund, and afterwards say that she shall not dispose of it: therefore it is quite consistent with what was decided in *Acton v. White* and the general understanding of the profession, independently of *Brown v. Bamford* and *Barrymore v. Ellis*.

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In this case the appointment made by Mrs. Duckham is a perfectly good appointment.

Another question in the cause arose under the following circumstances.

By the will the trustees were directed to pay an annuity of 100*l.*, after Sarah Duckham's death, to her husband Joseph Duckham, out of the dividends and interest of the one-fifth share of the testator's residuary estate settled to her separate use, and, subject thereto, to stand possessed of the capital in trust for her children in equal shares when and as they should respectively attain twenty-one, with benefit of survivorship on any of them dying under that age.

In April, 1837, Joseph and Henry, two of the children, who had attained twenty-one, assigned their shares of the testator's residuary estate to one Hele (subject to their mother's life-interest and to their father's *annuity), to secure the repayment of 2,000*l.*, which Hele had lent them: and their father assigned his annuity, to Hele, by way of further security for that sum.

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In August, 1837, the two children and their father charged their respective interests before mentioned with the repayment of the further sum of 1,000*l.* lent to them by Hele.

In March, 1840, Sarah Duckham made the appointment to the plaintiff mentioned in the preceding part of this case, for securing the repayment of 2,500*l.* lent to her son William, and by the same deed, her husband assigned his annuity and her son, William, assigned his share of the testator's residuary estate, to the plaintiff for the same purpose. Shortly after the execution of the last-mentioned deed, the plaintiff gave notice of it, to the trustees of the will,

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In September, 1840 (at which time Hele was dead), an indenture was made between his executors of the first part, Henry Duckham of the second part, Joseph Duckham, the father, of the third part, and the defendant Oughton of the fourth part, by which, after reciting that Joseph Duckham, the son, had repaid his moiety of the sums of 2,000*l.* and 1,000*l.*, to Hele's executors, and that, therefore, they had re-assigned to him his share of the testator's residuary estate, and that Henry Duckham, in order to enable him to pay off the remaining moiety of those two sums and to supply his other occasions, had contracted, with Oughton, for the loan of 2,500*l.*, the repayment whereof, with interest, was to be secured as thereafter mentioned; and that Joseph Duckham, the father, had agreed to join in the *security as the surety for Henry Duckham: it was witnessed that in consideration of 1,500*l.* paid, by Oughton, to Hele's executors, in full satisfaction and discharge of what was due to Hele's estate, and of the further sum of 1,000*l.* paid by him to Henry Duckham, the executors, at the request of Henry Duckham, assigned and Henry Duckham assigned and confirmed his share of the testator's residuary estate, to Oughton, subject to redemption on the repayment of 2,500*l.* with interest: and Joseph Duckham, the father, assigned his annuity to Oughton in like manner.

Oughton, by his answer, submitted that his security was an assignment of the mortgage made to Hele in April, 1837, and that, therefore, he was entitled to priority over the plaintiff, with respect to the annuity of 100*l.*

Mr. Walker and *Mr. Blower*, for the plaintiff, said that no assignment had been made of the debt and security to Hele, and, therefore, that security was not kept on foot; and, consequently, Oughton was not entitled to any priority in respect of it. [They cited *Parry v. Wright* (1), *Toulmin v. Steere* (2) and other cases].

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Mr. Wakefield and *Mr. Heathfield* for the defendant Oughton, said that it was evident from the recitals and operative part of the deed of September, 1840, that the parties intended that Hele's security should be kept on foot: that *Toulmin v. Steere* was a case in which the owner of an estate attempted to avail himself of a prior *mortgage of his own: and that *Parry v. Wright* also was distinguishable from the present case; for there the security, the benefit of which was claimed, had been extinguished.

(1) 24 R. R. 191 (1 Sim. & St. 369; (2) 17 R. R. 67 (3 Mer. 210).
affirmed 5 Russ. 142).

Mr. Anderdon, Mr. Beales, Mr. Craig, Mr. Toller, Mr. Hallett and Mr. Bates, appeared for other parties.

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THE VICE-CHANCELLOR :

Where a term is vested in trustees for the purpose of raising a given sum for portions, it frequently happens that the trustees are required to raise not the whole sum at once, but part of it at one time and part at another : and then the practice is for the trustees to assign the property comprised in the term, or part of it, by way of security to the person who advances the sum required : and if, as frequently happens, that security is made the subject of transmission from hand to hand, the practice is to assign the sum as well as the security for it. In the present case, however, the parties have not taken any such course ; for they have not made any assignment of the debt due to Hele's estate ; and, therefore, they have not adopted the proper means to keep his security on foot.

I have read through the deed of September, 1840, and it appears to me that the parties to it did not even intend to keep that security on foot ; on the contrary, it appears, on the face of the deed, that the debt was not assigned to a trustee for Oughton (as it ought to have been to give him the priority which he claims), but that it was extinguished.

The result is that the securities must rank according to their dates.

MARTIN *v.* MAUGHAM (1).

(14 Simons, 230—234 ; S. C. 13 L. J. Ch. 392 ; 8 Jur. 609 (2).)

Although an indefinite accumulation for charitable purposes contrary to the rule against perpetuities is void, yet the Court may direct the charitable intention to be carried into effect *cy près*.

A testamentary annuity determinable if the annuitant should attempt to sell or dispose of his interest, held to have determined upon presentation of a petition for insolvency by the annuitant.

1844.
July 16, 17.

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V.-C.

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SAMUEL BUTLER, by his will dated in May, 1821, bequeathed the whole of his property to trustees in trust to convert the same into money and to invest the proceeds in the Three per Cents., and after paying certain annuities, to add the dividends to the capital until it should produce an income of 600*l.* a year ; when he hoped that

(1) Margham in the original report, subsequently corrected in errata.

(2) *Biscoe v. Jackson* (1887) 35 Ch. Div. 460, 56 L. J. Ch. 540 ; *Adams v.*

Adams [1892] 1 Ch. 369, 376, 61 L. J. Ch. 237, C. A. ; *In re Porter* [1892]

3 Ch. 481, 486, 61 L. J. Ch. 688.

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every five years' receipt of that income would produce an increase of income of 150*l.* a year ; and his will was that every such increase of income should be appropriated as he should thereafter specify, for the benefit of the parish charity-schools of this country, in the following order, namely, the first school to receive the benefit, was to be St. Ann's, Limehouse ; the second, St. Paul's, Covent Garden ; the third, St. Mary's, Sandwich ; the fourth, St. Paul's, Shadwell. The testator then named nine other parishes, and left it to his trustees to fix, appoint and establish, in *regular rotation, the remaining parish charity-schools, taking always the nearest parish to the last establishment.

The testator died in May, 1837.

On a suit for the administration of his estate coming on to be heard for further directions,

Mr. Cooper and *Mr. Lloyd*, for the next of kin, said that the accumulation directed by the testator was perpetual ; that, regard being had to the amount of his property, which did not exceed 8,800*l.*, to the price of stock and to the annuities, which amounted nearly to 200*l.* a year, the accumulation must necessarily continue for a much longer time than the law permitted ; and, therefore, the direction to accumulate and all the ulterior gifts, must fail, and the next of kin must be declared to be entitled to the property, subject to the payment of the annuities : *Curtis v. Lukin* (1).

THE VICE-CHANCELLOR :

The whole scheme of the will, so far as the charities are concerned, is founded on a legal impossibility.

Mr. Romilly and *Mr. Daniel*, for the trustees, said that where, as in the present case, a testator had devoted his property to certain charitable purposes, but those purposes could not be carried into effect, the Court would give effect to his intention *cy près*, and would direct the Master to approve of a scheme for that purpose : *The Attorney-General v. The Bishop of Chester* (2) ; *The Attorney-General v. The Ironmongers' Company* (3).

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THE VICE-CHANCELLOR :

The law on the subject is stated by Lord ELDON with great clearness, in *Moggridge v. Thackwell* (4).

(1) 59 R. R. 442 (5 Beav. 147).

(2) 1 Br. C. C. 444.

(3) 39 R. R. 302 (2 My. & K. 576).

(4) 6 R. R. 76 (7 Ves. 36).

Mr. Stuart, Mr. Spence, Mr. Lovat, Mr. Wray, Mr. Prescott White, Mr. Heathfield, Mr. Simpson, and Mr. Jervis, appeared for the other parties.

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MAUGHAM.

THE VICE-CHANCELLOR :

Although the particular mode in which the testator meant the benefits to be doled out to the objects of his bounty cannot take effect, yet, as there is, confessedly, a devotion of his personal estate to charitable purposes, my opinion is that his next of kin have no claim at all to his property. I conceive that, if a testator has expressed his intention that his personal estate shall be, in substance, applied for charitable purposes, the particular mode which he may have pointed out for effecting those purposes, has nothing to do with the question whether the devotion for charitable purposes shall take place or not: and that, whatever the difficulty may be, the Court, if it is compelled to yield to circumstances, will carry the charitable intention into effect through the medium of some other scheme.

I shall, therefore, declare, that subject to the annuities, there is a good gift of the residue to charitable purposes to be carried into effect according to a scheme to be settled by the Master; and I shall direct the Master, in settling the scheme, to have regard to the objects specified in the will.

Another question in the cause was whether one of the annuities given by the will, had ceased, under the following circumstances.

The testator, in a codicil, begged that it might be understood and remembered that his will and desire was that, in case any of his annuitants should attempt to sell or dispose of their interest in his annuities to them (which he wished only for their peculiar and particular benefit), from that moment his bequest to them was to terminate for ever, and the principal and interest of each bequest, to revert to his general fund as specified in his will.

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One of the annuitants, being in custody for debt, presented his petition to the Insolvent Debtors' Court, under 1 & 2 Vict. c. 110, s. 35, stating that he was willing that all his property should be vested in the provisional assignee, according to the provisions of the Act, and praying to be discharged from custody. In the schedule to the petition, the annuitant stated, with reference to his annuity, that the testator left it to him, with a condition that, in the event of the same being put up to sale or otherwise disposed of,

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r.
MAUGHAM.

it should become void and be appropriated to different charities in his will named. Afterwards the Insolvent Debtors' Court made the usual order for vesting the annuitant's property in the provisional assignee of the Court, for the benefit of his creditors: and one May was appointed assignee of his estate and effects.

Mr. Stuart and *Mr. Heathfield*, for the annuitant, said that their client, in his petition to the Insolvent Debtors' Court, had expressed, merely his willingness that his property should be vested in the provisional assignee, and besides, that he had referred to the condition annexed to the annuity by the codicil; and, therefore, it could not be said that he had attempted to dispose of his property: *Pym v. Lockyer* (1).

[234] On *Mr. Wray*, for the *Attorney-General*, proceeding to argue *contrà*,

The VICE-CHANCELLOR said that he need not trouble himself on the point; for there could be no doubt that the annuity was gone; and, with respect to the time at which it ceased to be payable, that the presenting of the petition was an attempt to dispose of it, and, therefore, it ceased on the presentation of the petition.



1844.
July 25.
SHADWELL,
V.-C.
[244]

COCKSEGE *v.* COCKSEGE (2).

(14 Simons, 244—247; S. C. 13 L. J. Ch. 384; 8 Jur. 659.)

A covenant, before marriage, that, in case of any separation taking place between the husband and wife, the husband shall make a certain provision for his wife, is void.

By articles of agreement dated the 13th of September, 1837, and made between Thomas Martin Cocksedg of the first part, Ann Whale, the daughter of William Whale, then an infant, of the second part, and William Whale of the third part, after reciting that a marriage was intended to be shortly had and solemnized between Thomas Martin Cocksedg and Ann Whale, and that in contemplation of the marriage, it had been agreed between the parties, that T. M. Cocksedg should settle and confirm, to Ann Whale, an adequate annual sum as and for her maintenance, to be enjoyed by her independently of all control of T. M. Cocksedg, in

(1) 56 R. R. 84 (12 Sim. 394).

(2) *In re Moore* (1887) 39 Ch. Div. *Duchess of Marlborough v. Duke of Marlborough* [1901] 1 Ch. 163. 70 116, 57 L. J. Ch. 936, 59 L. T. 681; L. J. Ch. 244, 83 L. T. 578, C. A.

the event of any separation taking place between them during their lives, and in case Ann Whale should survive Thomas Martin Cocksedge, to be enjoyed by her during her life, free from the control of any future husband: It was witnessed that, in consideration of the intended marriage, Thomas Martin Cocksedge covenanted with William Whale, that he would immediately after the solemnization of the marriage, or so soon afterwards as conveniently might be, make an effectual settlement in favour of Ann Whale, and thereby secure to her the payment of the annual sum of 400*l.*, to be paid to her by equal quarterly payments on the usual quarter-days in the year, in the event of the death of Thomas Martin Cocksedge, or any separation taking place between him and Ann Whale during their lives; the first payment thereof to be made on the first of such days then next following the occurrence of such event, and to be free from the debts, control, or engagements of any future husband, and that Thomas Martin Cocksedge *would thereby charge with the payment thereof some one of his estates of ample value held by him in fee simple, and also that he would, by deed, create a term of 1,000 years, in such freehold estate, to the trustees of such settlement, with full power to them in the event of nonpayment of the sum of 400*l.* at the days and times and in manner aforesaid, to mortgage or sell the same for the purpose of satisfying such annual payment, and with all other usual powers, provisoes, conditions, and covenants.

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The marriage was solemnized shortly after the date of the articles; and Mr. and Mrs. Cocksedge lived together until August, 1843, when Mr. Cocksedge left his wife and he had lived apart from her ever since.

The bill was filed, by Mrs. Cocksedge and her father, against her husband and another person, praying for a specific performance of the articles.

Mr. Cocksedge, in his answer, said that, in August, 1843, he refused and ceased to cohabit with his wife, and had ever since lived apart from her by reason of adultery believed, by him, to have been committed by her, and that he had commenced and was prosecuting proceedings against her in the Consistory Court of London for a divorce by reason of such adultery; and that he had commenced and was prosecuting an action, in the Court of Exchequer, against the person with whom he believed the adultery was committed: he added that he had been advised that the articles, so far as the same purported, by anticipation, to secure a provision

COCKSEGE ^{c.} for his wife, in the event of any separation taking place between them during their joint lives, were contrary to public policy and void.

[246] A motion was now made, on behalf of the plaintiffs, for the appointment of a receiver of the rents of Mr. Cocksedg'e's estates mentioned in the schedule to his answer.

Mr. Stuart and *Mr. Tennant*, in support of the motion, said that an antenuptial contract for securing a provision for the intended wife, in case a separation should take place between her and her intended husband after their marriage, was perfectly valid ; and that, in the present case, the husband admitted, in his answer, that the separation was his own act. [They referred to *Sidney v. Sidney* (1).]

Mr. Bethell and *Mr. Prendergast* appeared to oppose the motion, but were not heard.

THE VICE-CHANCELLOR :

If the articles had stipulated that, in case the wife should elope from her husband and live in a state of adultery, the husband should pay her an annuity of 400*l.* during the time she lived in that state, would that stipulation have been valid ? I put that case, because the articles speak of any separation taking place.

[*247] Where the contract is that, in the event of any separation taking place between the husband and the wife, the husband shall make a certain provision for his wife, the Court sees that it is an inducement to the wife to be guilty of the worst conduct. There may be innocent as well as guilty causes of separation between husband and wife ; but where the covenant by which the *provision is secured to the wife, is expressed in general terms, as it is in the present case, the Court cannot sever it, and say that it shall be good in one case and bad in another. If the bad conduct of the wife may be the contingency on which the husband will be bound to make the provision, the contract must fail altogether ; for it is an inducement to the wife to be guilty of the most atrocious conduct in order to entitle herself to the provision.

Therefore, unless I have it made out that the contract in this case is such as this Court will enforce, I cannot grant the motion.

Mr. Stuart asked that a case might be sent for the opinion of a court of law upon the validity of the covenant; but it was ultimately arranged that the motion should stand over, with liberty to the plaintiffs, or either of them, to bring such action, on the covenant, as they might be advised.

[A case was afterwards directed by Vice-Chancellor WIGRAM, on the hearing of this suit, for the opinion of a court of law as reported in 5 Hare, 397—405, but the VICE-CHANCELLOR did not express any opinion on the question.—O. A. S.]

NORCOTT *v.* GORDON.

(14 Simons, 258—261; S. C. 8 Jur. 679.)

A testator having freeholds and copyholds in fee, gave an annuity to his wife, in lieu and satisfaction of all dower and thirds, or other claims and demands which she might otherwise have had upon his estate, and died intestate as to his real estates. His widow was his customary heir:

Held that she was not bound to elect between the annuity and the copyholds, but was entitled to both:

Held also, the assets being deficient, that the annuity was to be paid in priority to the pecuniary legacies given by the will.

THE testator in this cause, was seised in fee of freehold estates, and of copyhold estates parcel of the manor of Taunton Deane in Somersetshire. By his will, he gave an annuity of 1,000*l.* to his wife for life; and declared that the same *was to be accepted by her in lieu and satisfaction of all dower and thirds, or other claims and demands which she could or might otherwise have had or been entitled to, out of, upon, or against his estate:* and he directed that she, when thereunto required by his executors, should, at the costs and charges of his estate, execute a good and sufficient release of such her rights, claims and demands, or otherwise the provision thereby made for her should be null and void.

The testator died without issue, and intestate as to his real estates, leaving his widow and his brother (who was his heir-at-law) him surviving.

It appeared from a report made, by the Master, in obedience to the decree at the hearing, that if a tenant of customary lands of inheritance within the manor of Taunton Deane, died leaving a widow, she was entitled to inherit the lands, and to be admitted thereto, to hold the same to her and her heirs according to the custom of the manor: that, if the tenant did not leave a widow

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v.
COCKSEGE.

1844.
July 27.

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V.C.
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GORDON.

[*259]

but left an only son, then that son, and if he left two or more sons, then the youngest of them, was entitled to inherit the lands ; and that if he left no son but left an only daughter, then that daughter, and if he left two or more daughters, then the youngest of them, was entitled to *inherit the lands : and that, if he left neither widow nor child, then his youngest brother was entitled to inherit the lands.

On the cause coming on to be heard for further directions, one question was whether, in consequence of the declaration in the will which is printed in italics, the testator's widow was bound to elect whether she would take the annuity of 1,000*l.* or the copyhold estates.

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Mr. Bethell and *Mr. Bagshawe*, for the widow, said * * as the testator had not disposed of the copyhold estates which he held of that manor, no case of election could arise with respect to them ; but the widow was entitled to them by descent, and to the annuity under the will : * * *Pickering v. Lord Stamford* (1).

Mr. Stuart and *Mr. Montagu*, for the testator's brother, said, first, that the word "inherit" in that part of the Master's report which related to the widow of a deceased tenant of the manor, was merely an inaccurate expression ; for it appeared in the subsequent part of the report, that, if the deceased tenant left a son, the son was not to take the estate away from the widow ; and, therefore, it was evident that the widow took the estate, not as heir to her husband, but by virtue of her right to freebench : secondly, that whether the widow in the present case claimed the copyholds in respect of her right to freebench or as being her husband's customary heir, still she was bound to elect ; for the testator had declared that the annuity was to be in lieu and satisfaction, not only of all dower and thirds, but also of all other claims and demands which she might otherwise have had or been entitled to upon his estate : and, therefore, if she accepted the annuity, she must release all her other claims and demands upon the testator's estate, whatever might be their nature or foundation.

THE VICE-CHANCELLOR :

If the testator in this case had had only freehold estates in fee-simple, a release by the widow would have allowed the lands to

(1) 3 Ves. 332 and 492 (see 16 R. R. 185).

descend to the heir, free from all claims and demands on her part. It happens, however, in this case, that the testator has left copyholds of inheritance, which he has not disposed of, and that the person to whom he has given the annuity is his customary heir : therefore, any release of her claims *and demands, would only allow the land to descend to her. Consequently, so far as the copyholds are concerned, the widow is not bound to elect.

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The testator's assets being insufficient to pay in full the widow's annuity and also the pecuniary legacies given by the will :

Mr. Bethell and *Mr. Bagshawe* contended that, as the annuity was expressed to be in lieu of dower, the widow was entitled to be paid it in priority to the other legatees : and

His Honour so decided.

The cases cited, were *Burridge v. Bradyl* (1) ; and *Heath v. Dendy* (2).

PHILLIPS *v.* BARLOW (3).

(14 Simons, 263—265 ; S. C. 14 L. J. Ch. 35.)

1844.
Nov. 4, 9.

The proceeds of timber cut and sold by order of the Court, during the life of a late tenant for life, who was impeachable of waste, ordered to be paid to the tenant for life in possession, who was unimpeachable of waste.

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V.-C.
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In this case the Court had ordered timber, which was decaying, to be cut and sold, during the life of the first tenant for life of the estate, who was impeachable of waste, and the proceeds to be paid into Court and invested, and the dividends to be paid to the tenant for life. On the death of that person, the next tenant for life, who was unimpeachable of waste, petitioned to have the timber-money paid to him.

Mr. Wilson and *Mr. Stinton*, for the petitioner, relied on *Waldo v. Waldo* (4).

The petition was opposed by

Mr. Stuart and *Mr. Tillotson*, on behalf of tenants for life in remainder ; and by

- (1) 1 P. Wms. 126. 139, 46 L. J. Ch. 613. *In re Barrington*
(2) 25 R. R. 135 (1 Russ. 543). (1886) 33 Ch. D. 523, 56 L. J. Ch. 175.
(3) *Lowndes v. Norton* (1877) 6 Ch. D. (4) 56 R. R. 26 (12 Sim. 107).

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BARLOW.

Mr. Bethell and Mr. Glasse on behalf of parties entitled to the inheritance of the estate :

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They said that all that the petitioner was entitled to, was the income of the fund in Court, during his life ; for he had no inheritance. The right to the timber was not vested in him ; but he was merely exempted from being sued if he committed waste. * * They added that the Court could not give the petitioner more than he was entitled to by virtue of his legal right ; and that it had been decided that a tenant for life without impeachment of waste, could not bring trover for timber cut before his possession commenced : [*Pigot v. Bullock* (1)].

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The VICE-CHANCELLOR, after stating the facts of the case, which he had taken time to consider, said that the order in *Waldo v. Waldo* had not been appealed from, and that, on reconsideration, he thought that what was done in that case was right ; and, as he saw no substantial distinction between that case and the present, he should make an order according to the prayer of the petition.

1844.
Nor. 5.
SHADWELL,
V.-C.
On Appeal.
*House of
Lords.*
1845.
June 23, 29.
Aug. 8.
Lord
LYNDHURST,
L.C.
Lord
CAMPBELL.
[265]

GARCIAS v. RICARDO (2).

(14 Simons, 265—272 ; S. C. 8 Jur. 1037 ; 9 Jur. 717 ; reversed under the title of *Ricardo v. Garcias*, 12 Cl. & Fin. 368—401.)

A plea of the judgment of a foreign Court need not set out the proceedings and judgment at length, but it should be supported by averments as to the identity of the subjects of the contest and of the questions put in issue by the suit with the subjects and matters at issue before the foreign tribunal, and should show the competency of the foreign tribunal and the finality of the foreign judgment by which the questions were decided.

THE plaintiff claimed to be entitled, under an agreement stated in his bill, to one-twentieth part of the profits of a loan to the Spanish Government, which J. A. Ardoin, a banker, who was resident in Paris, had negotiated in 1834 on behalf of the defendants Jacob and Samson Ricardo, of London, merchants. The bill prayed that it might be declared that, according to the true construction of the agreement between the plaintiff and the defendants, the plaintiff was entitled to be paid one-twentieth part of all the sums of money received by the defendants or on their behalf, for commission, interest, exchange or otherwise in respect or on account of the profits of the loan ; and that it might be referred, to the Master, to

(1) 2 R. R. 148 (1 Ves. Jr. 479). (2) *Mutrie v. Binney* (1887) 35 Ch. D. 614, 56 L. T. 455.

take an account of the sums of money so received, and that the plaintiff's share thereof might be ascertained, and might be paid to him by the defendants.

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RICARDO.

Jacob Ricardo being dead, Samson Ricardo, alone, pleaded to the bill as follows :

"That on the 14th of April, 1837, the plaintiff, being then domiciled in the kingdom of France and a subject of the Crown of France, sued out and prosecuted, according to the law and custom of the kingdom of France, a certain writ of summons or assignation directed to Messrs. Ardoin & Co. and Messrs. J. & S. Ricardo, whereby it is stated or recited that a loan having been contracted for, at Madrid, with the Spanish Government, on the 6th of December, 1834, by Mr. Ardoin, as well for himself as for his copartners, that operation gave rise to an association in participation, which had for its managers Messrs. Ardoin & Co. and J. & S. Ricardo & Co., and in which the said plaintiff became a participating party for a considerable sum, which he had paid punctually; and that he having in vain demanded, from Messrs. Ardoin & Co. and Messrs. J. & S. Ricardo & Co., an account of the management which had been entrusted to them, there resulted, from that fact, a contestation, which, according to the terms of the 51st article of the Code of Commerce, ought to be submitted to arbitrator judges: wherefore the plaintiff, by the said writ of summons or assignation, summoned the said Messrs. Ardoin & Co. and Messrs. J. & S. Ricardo & Co., to appear, on the 20th day of June then next, before the Tribunal of Commerce of the Seine, in order that the matter in dispute might be referred to arbitrator judges, according to the law and custom of the kingdom of France: that the plaintiff caused the writ of summons or assignation to be served on the defendant, on behalf of and as representing the firm of J. & S. Ricardo & Co.: that J. & S. Ricardo & Co. did not appear to the writ of summons or assignation, but that Messrs. Ardoin & Co. appeared before the Tribunal of Commerce of the Seine, in pursuance of the writ of summons or assignation, *and defended themselves against the claims of the plaintiff; and that, thereupon, such proceedings were had, before the said tribunal, that the tribunal, on the 21st of August, 1837, made a decree or order of that date, whereby, so far as concerned the demand made against Messrs. Ardoin & Co., the tribunal discharged Messrs. Ardoin & Co. from the action; and, so far as concerned the demand for participation made against Mr. Ardoin personally, the tribunal declared the plaintiff to be remediless in

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his demand against the said J. A. Ardoin, and condemned the plaintiff to pay the costs of that cause : and, so far as concerned the demand made against J. & S. Ricardo & Co., considering that they had not appeared, and that nobody had appeared in their behalf, the tribunal granted, to the plaintiff, the benefit of default against J. & S. Ricardo & Co. : and the tribunal sent the plaintiff and J. & S. Ricardo & Co. before the arbitrator judges, to receive judgment at their hands ; and the tribunal gave permission to the plaintiff to name Mr. Pierrugues, a banker, to be his arbitrator ; and the tribunal decreed that, within a fortnight from the day of notification of the now-stating judgment, J. & S. Ricardo should be bound to name an arbitrator, and in default thereof, the tribunal, by the now-stating judgment, named, *ex officio*, Mr. Bourceret to be their arbitrator ; and the tribunal ordered that the said arbitrator judges should give their award within three months from the day of the constitution of the tribunal of arbitration : that the defendant, on behalf and in the name of J. & S. Ricardo & Co., thereupon applied to the Tribunal of Commerce of the Seine, to stay proceedings upon the judgment by default so given against J. & S. Ricardo & Co. at the request of the plaintiff as hereinbefore is mentioned : that, on the 17th of January, 1838, the Tribunal of Commerce, by their decree *or order of that date, dismissed Messrs. J. & S. Ricardo from their opposition to the judgment of the 21st of August, 1837, and the tribunal ordered that the said judgment should be executed according to the form and tenor thereof : that this defendant, thereupon, in the name and on behalf of Messrs. J. & S. Ricardo & Co., appealed from the decree or order of the 21st of August and the 17th January, 1838, to the Cour Royale or Royal Court of Paris, and that the last-named Court, by their decree of the 9th January, 1839, affirmed the decrees or orders of the 21st of August, 1837, and the 17th January, 1838 : that the plaintiff appealed to the Cour Royale or the Royal Court of Paris, against the said judgment of the Tribunal of Commerce of the Seine, so far as the same had discharged Messrs. Ardoin & Co. from the action, and so far as the same had declared the plaintiff to be remediless in his demand against J. A. Ardoin personally : that, on the 30th of August, 1838, the Cour Royale, by their decree or order of that date, set aside the last-mentioned appeal, and condemned the plaintiff in the fine and costs of the appeal : that, in pursuance of the said several decrees of the 21st of August, 1837, the 17th January, 1838, and the 9th January, 1839, the defendant in the name of Messrs. J. & S. Ricardo & Co., appointed Mr. A.

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D'Eichtal, a banker in Paris, to be their arbitrator judge, and that A. D'Eichtal, together with Mr. Pierrugues, who was as aforesaid appointed by plaintiff as his arbitrator judge, appointed to meet on the 18th of May, 1839, at the office of Mr. D'Eichtal, in the Rue Lepelletier, to constitute a tribunal of arbitration to proceed upon the matters referred to them: that, on the 15th of March, 1839, the plaintiff sued out and prosecuted, according to the law and usage of the kingdom of France, a certain summons addressed to Messrs. J. & S. Ricardo & Co., whereby they were *called upon to appear, on the 18th of May then next, at the office of Mr. D'Eichtal, to render an account, to the plaintiff, of the operations of the Spanish loan, as well as of the profits it had produced, and which had resulted from it, and that, in a period of fifteen days from constituting the tribunal of arbitration; or unless, and on their failing to do so within the said period, that Messrs. J. & S. Ricardo & Co. should be condemned to pay, to the plaintiff, 2,000,000 of francs instead of the balance of the said account: that the plaintiff caused the said summons to be served on the defendant, on behalf and as representing Messrs. J. & S. Ricardo & Co.: that the said arbitrator judges attended at the time and place in the said writ mentioned, and, thereby, became duly constituted a tribunal of arbitration according to the law and usage of France; and the plaintiff and also the defendant, as representing and in the name of the firm of J. & S. Ricardo & Co., appeared before the tribunal of arbitration; and the arbitrator judges, then and there, proceeded upon the matters so referred to them as aforesaid, and that such proceedings were thereupon had, before the said tribunal of arbitration, that, afterwards, and on the 30th of August, 1839, the arbitrator judges made a decree or order of that date, whereby they declared that the plaintiff was remediless in his demand; and they condemned him to pay the expenses of the proceedings taken before them: that the plaintiff appealed to the Cour Royale of Paris, against the last-mentioned decree: that on or about the 31st of December, 1840, the Cour Royale of Paris gave judgment upon the said appeal, and they, by a decree or order of that date, annulled the same, and ordered that the judgment appealed against, should have full and entire effect, and condemned *the appellant in the fine and costs of the cause on appeal: that the said decrees or orders of the 30th of August, 1839, and the 31st of December, 1840, are still in full force and effect, not reversed, annulled or otherwise vacated: that the said proceedings so had in the tribunals and Courts in France were,

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at the time when they were so had, within the jurisdiction of the same Courts respectively, and were carried on in conformity with and according to the due course of law at those times established and in force in the kingdom of France : that the decree of the 30th of August, 1839, as affirmed by the said judgment of the 31st of December, 1840, is, according to the law and usage of the kingdom of France, final and conclusive ; and that the same are effectual to bar the plaintiff from prosecuting any other action or proceeding in the kingdom of France, for the same matters. And this defendant doth aver that the several matters and things in respect whereof relief was sought, by the plaintiff, against Messrs. J. & S. Ricardo & Co. in the aforesaid suit and proceedings in the said tribunals and Courts of France, were and are the same matters and things in respect whereof the said plaintiff, by his said bill, seeks discovery and relief against his defendant and Jacob Ricardo in the bill named ; and that the several claims and demands sought to be enforced by the plaintiff in the said proceedings in the said tribunals and Courts in France, were and are the same claims and demands which the plaintiff, by his bill in this suit, seeks to enforce against this defendant : and this defendant doth therefore plead the matters aforesaid in bar to the said bill and the relief and discovery thereby sought, and humbly hopes he shall not be compelled to make any further or other answer to the said bill, and prays to be hence dismissed &c.

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Mr. Stuart and Mr. Heathfield, in support of the plea. * * *

Mr. Bethell and Mr. Lewis, for the plaintiff. * * *

THE VICE-CHANCELLOR having said, in the course of the argument, that the judgment of the French Court might, for anything that appeared to the contrary in the plea, have proceeded either upon some defect or informality in the plaintiff's pleadings, or upon some other collateral matter, delivered judgment as follows :

I do not feel satisfied with this plea : for the matters pleaded are represented in such a general manner, that I have not a notion what it was that the parties were taking issue upon in the Court of France.

It seems to me that, in order to represent the matters in such a manner as that this Court can determine that the same point was determined in France as is put in issue by the bill, it ought distinctly to appear what was the course of proceeding adopted by the parties ;

for I *can easily understand that there may have been all those different decrees, first of all against the defendant and ultimately in his favour, which are represented here, without the question which is raised by this bill having been decided by the Court of France, namely, whether there was a valid contract and whether that contract had not been performed. If the proceedings had been stated more fully, I could at once have determined what was the point decided; but, as the matter is represented on this plea, I can easily conceive that the judgment in France might have been capable of being supported by the law of France, without, in the least, affecting the question which is raised by the bill.

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It seems to me that I should be in extreme danger of destroying the plaintiff's right to justice, if, upon the representation of the French proceedings as contained in this plea, I was at once to allow the plea, and put an end to the suit. In my opinion the matter ought to be stated, so as to represent that the general fact which is here stated as the ground of equity, was decided, by a Court of competent jurisdiction, not to be a ground of equity. I do not understand upon what ground the Court of France proceeded: for aught I know to the contrary it may have proceeded upon some ground which would quite justify the conclusion, without, in the least, affecting the plaintiff's right as stated upon the present bill: and, therefore, I think that I must overrule this plea.

Plea overruled: the plaintiff to be at liberty to amend his bill, and the defendant to be at liberty to amend his plea: costs reserved.

[The defendant appealed from this order to the House of Lords, and the appeal is reported in 12 Cl. & Fin. 368, under the title of *Ricardo v. Garcias*.

The LORD CHANCELLOR reversed the order, delivering judgment as follows:]

THE LORD CHANCELLOR:

This is an appeal from a decision of the VICE-CHANCELLOR OF ENGLAND. The case arose out of a loan transaction with the Government of Spain. Messrs. Ricardo & Co. entered into a contract with that Government, and Mr. Garcias was interested in the transaction. Accounts were rendered by Messrs. Ricardo to Mr. Garcias upon two occasions, through Mr. Ardoin, his banker in Paris; and the balance, which was stated to be due, was paid to

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Mr. Ardoin, on account of Mr. Garcias. Mr. Garcias was dissatisfied with these accounts, the last being represented by Messrs. Ricardo as the final settlement on account of this transaction. Proceedings were accordingly instituted in the Courts of France by Mr. Garcias against Messrs. Ricardo—one of the partners being at that time resident in Paris.

The subject was investigated and heard before the proper tribunal; and it appearing to be a commercial and partnership question, they referred it, according to the law of France, to certain arbitrator judges. After hearing the case on both sides, and attending to the different documents, they pronounced judgment in favour of Messrs. Ricardo, and the suit was dismissed. Mr. Garcias was dissatisfied with that decision, and appealed to the Cour Royale, at Paris. The case was heard a second time, on that appeal, and the decision of the Court below was affirmed, and Mr. Garcias was condemned in costs. The bill has since been filed by Mr. Garcias against Messrs. Ricardo. The defendants, Messrs. Ricardo, have pleaded in bar the judgments which they obtained in their favour in France; and the question is whether, having regard to *the manner in which these judgments are pleaded, they are a sufficient bar to this claim.

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In considering this question, we must assume the truth of every fact stated on the face of the plea. The plaintiff might have taken issue on those facts, if he had thought proper; but, in the shape in which the question now comes before your Lordships, every fact stated in the plea must be taken to be true.

The defendants, after stating the proceedings in the Courts of France, proceed thus: they aver, “that the several matters and things in respect whereof relief was sought by the said complainant against the said Messrs. J. and S. Ricardo & Co., in the aforesaid suit and proceedings in the said tribunals and Courts in France, were and are the same matters and things in respect whereof the said complainant by his said bill seeks discovery and relief against these defendants.” There is an averment therefore that the matters and things that were brought before the tribunals in France by Mr. Garcias, were the same matters and things in respect of which discovery and relief are sought by him in the Court of Chancery here. That fact must be taken to be true; “and that the several claims and demands sought to be enforced by the said complainant in the said proceedings in the said tribunals and Courts in France, were and are the same claims and demands which the said complainant by his said bill in this suit seeks to enforce against these

defendants.” That must also be taken to be true; “and that the matters in issue, and in respect of which the said complainant sought to be relieved, and the discovery and relief sought by the complainant in the said proceedings in France were and are the same as, and not in any manner different from, the matters *in issue, and the discovery and relief sought in and by the said complainant’s bill in this suit against these defendants.” So that it is averred, that the matters and things which were the subject of dispute before the tribunals of France are the same matters and things as are in dispute between these parties before the Court of Chancery here; and that the matters in issue in the Courts of France were the same matters as are in issue in the Court of Chancery in this country, and not other or different. That being so, and the averment not having been traversed, it would seem that if the foreign judgments can be pleaded in bar of the claim—which is not denied—these foreign judgments are sufficiently pleaded in the present case.

But then the VICE-CHANCELLOR OF ENGLAND, referring to the bill, adverts to one allegation in it, and, on the ground of that allegation, he was of opinion that the plea was not sufficient, and that it must be overruled. That allegation is to this effect: that after the decision by the tribunal in France, further commissions and further receipts of interest were obtained in respect of these transactions by Messrs. Ricardo. Now the VICE-CHANCELLOR OF ENGLAND, in the course of his judgment, as I understand that judgment, expressed himself to this effect: It does not appear precisely upon what ground the judgment was pronounced; if it was pronounced upon the principle that the suit could not be maintained generally, then that would be an answer to these subsequent receipts; it would apply as well to the receipts obtained subsequent to the judgment as to those before; that is, if it was denied that there was originally any right of action, or any partnership, or anything which went to the whole suit, it would cover the subsequent payments. But it is possible that the Court might have decided on this ground, that up to the period of the institution of the suit Mr. Garcias had received satisfaction of all he was entitled to receive up *to that time; and if the judgment proceeded upon that ground, it would be perfectly consistent with the judgment, that he should be entitled to recover in respect of any receipts subsequent to the date of the judgment. On that ground it was that the VICE-CHANCELLOR considered the plea to be insufficient. But with all deference to, and respect for the opinion of, that

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learned Judge, if we look very closely to the averments in the plea, they afford, I think, an answer to that objection. The averment is to this effect: the defendants allege that the matters in issue in this suit are the same, and not in any respect different from the matters in issue in the French Courts. As this averment must be taken to be true, it follows that the question in issue in the French Courts must have involved as well the future as the past accounts; and the question must have been general, and not merely applicable to the then state of the receipts and payments; it must have included the right to share in the future as well as in the past receipts, and to call for an account of such receipts. The Courts then having pronounced against the claim, they must have proceeded either on the ground that no such right had ever existed, or that it had in some way been put an end to. It is obvious that, in either view of the case, the judgment would be a bar to the present claim. It appears to me, therefore, considering the plea in this way, that it covers the whole case, and is a complete answer to the plaintiff's bill. I am of opinion, therefore, upon this ground, that the judgment of the VICE-CHANCELLOR must be reversed (1).

Lord CAMPBELL [concurred and delivered judgment shortly to the same effect].

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Nov. 8, 14.

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[14 Sim. 273]

WHITE v. DOBINSON.

(14 Simons, 273—274.)

A.'s ship damaged B.'s. B., after he had received a sum of money under a policy which he had effected on his ship, brought an action against A., and recovered damages for the injury done to his ship: Held that the underwriter had a lien on the amount recovered, for the sum paid on the policy.

THE *Diana*, a ship belonging to the defendant Hicks, having been damaged at sea, by the *Xenophon*, a ship belonging to the defendant Dobinson, the plaintiff, who had insured the *Diana*, paid Hicks 205*l.* on account of the damage. Afterwards Hicks brought an action against Dobinson, to recover damages for the injury occasioned by the *Xenophon*. That action was referred; and the arbitrators awarded Dobinson to pay Hicks 817*l.* The plaintiff

(1) Lord BROUGHAM left London a few days before the judgment in this appeal was given, but his Lordship having since read the above observa-

tions of the LORD CHANCELLOR, desired it to be understood that he entirely concurs in them and in the judgment.

then filed his bill claiming a lien, on the sum awarded, for the 205*l.* which he had paid to Hicks, and praying for an injunction to restrain Dobinson from paying that sum, and Hicks from receiving it, without first satisfying the plaintiff's lien.

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Mr. Bethell and *Mr. Wood* now moved for the injunction. They cited *Randal v. Cockran* (1); *Blaauwpot v. Da Costa* (2); *Brooks v. Macdonnell* (3).

Mr. Stuart and *Mr. Anderson*, for Hicks, said, first, that if the plaintiff had any such right as he claimed by his bill, it was a legal and not an equitable right: that, in *Randal v. Cockran*, the Prize Commissioners had refused to permit the insurers to claim any part of the prizes, and it was on that account that they were held entitled to relief in equity; but, in the present case, it was not even alleged that the plaintiff had been prevented from enforcing his right at law.

Secondly, that the right of the insurer did not arise even at law, until he had fully compensated the insured for his loss; which, it was evident that the plaintiff, in the present case, had not done. *Da Costa v. Firth* (4); *Park on Insurance*, 226 and 227.

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THE VICE-CHANCELLOR :

My opinion is that this case comes within the principle distinctly stated, by Lord HARDWICKE, in *Randal v. Cockran*: "The person originally sustaining the loss was the owner, but, after satisfaction made to him, the insurer."

A question seems to be raised, by the affidavits, as to the subject to which the sum awarded, is to be attributed; but I think that quite sufficient appears on the affidavits, to warrant the Court in retaining the fund and not letting it pass into the hands of the insured, until that question has been settled: and, if it should turn out that the sum awarded by the arbitrators, was awarded in respect of the damage done, by the *Xenophon*, to the *Diana*, the case will come within the principle laid down, by Lord HARDWICKE, in *Randal v. Cockran*, and by Lord NORTHINGTON, in *Blaauwpot v. Da Costa*.

The only other observation that I have to make, is that, though the question came before Lord HARDWICKE and Lord NORTHINGTON,

(1) 1 Ves. Sen. 98.

500).

(2) 1 Eden. 130.

(4) 4 Burr. 1966.

(3) 41 R. R. 336 (1 Y. & C. (Exch.)

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I do not recollect that it arose during the whole of my practice at the Bar. My opinion, however, is that the law is plain; and, as I cannot deal fairly with the case without securing the fund, I shall grant the injunction.

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DOWLEY v. WINFIELD (1).

(14 Simons, 277—303; S. C. 8 Jur. 972.)

The presumption that a man who has not been heard of for seven years is dead relates only to the fact of death. The time of death when material must be a subject of distinct proof.

A. went abroad in Sept., 1830. His father died in Sept., 1833. About twenty months previous to that time, A. was heard of for the last time.

The Court ordered a share of the father's residue bequeathed to A., to be transferred to his brother, as the sole next of kin of the father living at the father's death, on the brother giving security to refund it, in case A. should be living or should have died after his father.

THE bill, which was filed by Thomas Dowley, one of the children and residuary legatees of the testator in the cause, who died on the 19th of September, 1833, prayed for the usual accounts of the testator's personal estate possessed by the defendants, his executors; for an inquiry whether Frederick William Dowley, the other child and residuary legatee of the testator, was living or dead, and if dead, at what time he died; and that one moiety of the clear residue of the testator's estate might be paid to the plaintiff as legatee thereof, and that the other moiety also might be paid to him, as the only surviving child and sole nearest of kin of the testator at the time of his death.

[278] By an order in the cause, dated the 16th of December, 1839, the Master was directed to inquire and state whether F. W. Dowley was living or dead, and, if dead, when he died, and whether he was ever and when married, and whether he left any will or died intestate, and who were or was his next of kin at the time of his death &c. &c., with liberty to state special circumstances.

On the 23rd of March, 1842, the Master reported as follows: that, in or about September, 1830, F. W. Dowley, who was then about fifteen years old, left England as one of the crew of a South Sea whaler, called the *Partridge*; that, although the ship arrived in London, on its return from the South Seas, in the beginning of

(1) *In re Phené's Trusts* (1870) L. R. 7 Ch. 120, 41 L. J. Ch. 219, 25 L. T. 5 Ch. 139, 39 L. J. Ch. 316, 22 775.
L. T. 111; *In re Walker* (1871) L. R.

1834, F. W. Dowley had never returned to this country, nor had any tidings been heard of him since he left England, except that, in February, 1834, the captain of the ship called upon the defendants, in consequence of their having applied to him for information respecting F. W. Dowley, and stated to them that F. W. Dowley ran away from the *Partridge*, at Woahoo, one of the Sandwich Islands, about two years then since, and that the captain had heard nothing of him subsequently; that several ships were lying at Woahoo, and the captain thought it not unlikely that F. W. Dowley might have got on board one of them bound for America. The Master further found that the defendants, in consequence of the above information, inserted an advertisement in the *Times* and *Morning Advertiser* newspapers, on the 3rd of October, 1834, addressed to merchant seamen and others, and requesting to be furnished with information as to the then abode of F. W. Dowley, or, if he was dead, as to the place of his decease; and that the plaintiff caused 500 copies of the advertisement to be printed and distributed *at the various docks in London, and in the vicinity thereof; and that, in 1835, the defendants caused another advertisement to be published in the *Times* and in two Liverpool papers, and also in the *American Morning Courier and New York Inquirer*, and in the *Boston Daily Commercial Gazette*, and other American newspapers, offering a reward of 50*l.* to any person who would furnish them with information as to the place of abode or death of F. W. Dowley; but the defendants did not receive any tidings relative to him. The Master further found that the captain of the *Partridge* died in December, 1839, and concluded his report by stating that, under the circumstances, he was unable to certify as to any of the matters referred to him.

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A petition was presented by the plaintiff, and was heard with the cause on further directions, praying that the report might be confirmed, and that, under the circumstances stated in the report, the share of the testator's personal estate bequeathed to F. W. Dowley, might be declared to belong, to the plaintiff, as only surviving child and sole next of kin of the testator at the time of his death, and might be directed to be transferred and paid to the plaintiff accordingly.

Mr. Stuart and *Mr. James*, appeared in support of the petition, and asked to have the whole residue of the testator's estate, transferred to the petitioner, on his giving security to refund one moiety

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of it, in case F. W. Dowley should be still living, or should have died after the testator. They said that, as F. W. Dowley had not been heard of for more than twelve years, the Court was bound to presume that he was dead; and that, as there was no evidence that he was alive at any particular period during his father's lifetime, subsequent to the time when *he left his ship, which was more than a year and a half before his father died, the Court might fairly presume that he died in his father's lifetime.

Mr. T. H. Hall, for the executors, submitted that, if the circumstances stated by the Master authorized the Court to presume that F. W. Dowley was dead, they did not afford any ground for presuming that he died in the testator's lifetime.

Mr. Stuart, in reply, said that the case was one in which he asked the Court to dispose of property on a ground which, if not established by strict and positive evidence, was highly probable; as the Court was in the habit of doing where the title of a claimant depended on a lady of advanced age, not having issue.

The VICE-CHANCELLOR considered that the circumstances stated in the Master's report, authorized him to direct the property bequeathed to F. W. Dowley to be transferred to the plaintiff, on his giving security, to be approved of by the Master, to refund it in case F. W. Dowley should be living or should have died after the testator.

1844.
 Nov. 19, 20.

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 V.-C.

[303]

AVARNE *v.* BROWN (1).

(14 Simons, 303—309; S. C. 14 L. J. Ch. 30; 8 Jur. 1037.)

An abstract showed the equitable fee to be in the vendor, and the legal estate to be in A. as a mortgagee for a term, and, subject thereto, in B. in fee in trust for A. By a supplemental abstract it appeared that, before the first abstract was delivered, A. assigned the mortgage debt to B. and was declared a trustee of the term for him, and that he had since died intestate; that his father, who first took out administration to him, was also dead, and that he remained unrepresented for some years; after which S. took out administration to him:

Held that the first abstract showed a sufficient title; the tracing of the title to the legal estate being matter of conveyance merely, where the vendor's right to call for the conveyance thereof is proved.

THIS was a suit for specific performance by the vendor of an estate against the purchaser.

(1) In *Camberwell and South London Building Society v. Holloway* (1879) 13 Ch. D. 754, 49 L. J. Ch. 361, 41 L. T. 752, where the vendor was clearly

The bill was filed on the 25th of November, 1834.

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It appeared, by the first abstract delivered by the plaintiff, that, under a conveyance made in 1825, the fee simple of the estate was vested in John Salt, in trust for the plaintiff, his heirs and assigns; and that, in May of the same year, the plaintiff and Salt, demised the estate, by way of mortgage, to Sarah Powell, for 1,000 years, for securing 4,000*l.* and interest: and, the Master, under the impression that the title was correctly represented by the abstract, reported in favour of it.

Afterwards certain facts relating to the title (which are mentioned in the Master's report after stated) were discovered; in consequence of which the defendant obtained an order dated the 13th of July, 1843, by which it was referred, to the Master, to inquire and state whether, having regard to the affidavit of the defendant, sworn on the 26th of July, 1842 (1), there had been a complete title made to the estate; and whether a proper conveyance thereof had been executed by all necessary parties; and when such title was shown and such conveyance executed.

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On the 14th of March, 1844, the Master made his report in obedience to that order; whereby he found that, by an order of the 4th of March, 1835, it was referred to him to inquire and state whether a good title could be made to the farm and lands in the pleadings mentioned; and, in case he should find that a good title could be made, he was to state at what time such title was first shown: that he made his report in pursuance of that order, on the 15th of June, 1836, and, thereby, certified that a good title could be made, and that such good title was first shown prior to the filing of the plaintiff's bill: that the report was afterwards confirmed: that, at the time he made his said report, it appeared, by the original abstract laid before him, that the legal estate in fee simple was vested in John Salt, and that the legal estate in the term of 1,000 years, was vested in Sarah Powell: that the draft conveyance was prepared upon the assumption that the title so represented by the original abstract, was correct: and that, after it had been forwarded for perusal, it appeared that *John Salt had died, a

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entitled to call for the legal estate, but it did not appear on the face of the abstract where the legal estate was, *JESSEL, M. R.*, held (13 Ch. D. p. 763) that it was unnecessary for the vendor to trace the title to the outstanding legal estate further than to show his

capacity to require a conveyance thereof.—O. A. S.

(1) The papers with which the reporter was furnished did not contain this affidavit. It, most probably, verified the facts alluded to above and stated in the Master's report.

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bachelor and intestate, on the 23rd of January, 1829, which was before the filing of the plaintiff's bill: that evidence was given, in compliance with the requisitions of the purchaser, that William Salt was the eldest brother and heir-at-law of John Salt: that, after the draft conveyance was so forwarded, a supplemental abstract of a deed dated the 18th day of August, 1825, was delivered, by which it appeared that the 4,000*l.* was assigned to John Salt, his executors &c., and it was declared that Sarah Powell, her executors &c. should stand possessed of the term in trust for John Salt, his executors &c.: that, on the 12th of February, 1829, letters of administration to J. Salt were granted to his father: that the father died in December, 1834, and letters of administration *de bonis non* of the son, dated the 18th of July, 1838, were granted to Charles Salt. The Master certified that he was of opinion that, having regard to the defendant's affidavit sworn the 26th of July, 1842, there had been a complete title made to the estate; and that a proper conveyance thereof had been executed by all necessary parties, and that such title was shown in or about July, 1838, and that such conveyance was executed on the 18th of May, 1839.

In consequence of the Master having reported that a good title to the estate was shown at a time which was subsequent to the filing of the bill, the plaintiff excepted to his report.

Mr. Stuart and *Mr. Cayley Shadwell*, in support of the exception, contended that a good title was shown by the first abstract; inasmuch as that abstract showed the existence of the mortgage, and that the legal estate in fee was vested in John Salt, and the equitable estate in fee, in the plaintiff; and that the facts afterwards disclosed were matters of conveyance and not of title. They

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cited **Wynne v. Griffith* (1); *Berkeley v. Dauh* (2); *Jumpson v. Pitchers* (3); and *Lord Braybrooke v. Inskip* (4), where Lord ELDON, L. C. said: "As to the question when the abstract was complete, the abstract is complete whenever it appears that, upon certain acts done, the legal and equitable estates will be in the purchaser."

Mr. Bethell and *Mr. Blunt*, in support of the report, said that
* * it was laid down in *Wynne v. Griffith*, that, where the legal

(1) 1 Russ. 283. See judgment, to attend the inheritance.—O. A. S. post, p. 596. (3) 66 R. R. 5 (1 Coll. 13).

(2) 16 Ves. 380, where an outstanding term was vested in a trustee in trust (4) 7 R. R. 106; see p. 109 (8 Ves. 417; see 436).

fee is outstanding and the abstract does not show in whom it is vested, the objection is a matter of title and not of conveyance: and, moreover, that the original abstract represented that Sarah Powell was the person in whom the term of 1,000 years was beneficially as well as legally vested; whereas, before that abstract was delivered, she had assigned the mortgage-money to John Salt; but the deed of assignment did not appear upon the abstract. * * *

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Mr. Stuart, in reply, said that it was matter of title to show that the equitable fee was vested in the vendor; which the plaintiff had done by his original abstract; but that it was mere matter of conveyance to trace the title to the outstanding legal estate, whether that estate was in fee or for a term of years; and that the proposition cited from the report of *Wynne v. Griffith*, was stated rather more broadly, in the marginal note, than the judgment authorized.

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The VICE-CHANCELLOR observed, in the course of the argument, that the case of *Wynne v. Griffith* differed, essentially, from the case put by Sir Edward Sugden, 2 Vend. p. 40: for, in *Wynne v. Griffith*, it was uncertain in whom the legal fee was vested; whereas, in the case put by Sir Edward Sugden, the legal fee was vested in a defined person.

At the conclusion of the argument,

His Honour delivered the following judgment:

This is a very plain case.

The state of the title as shown by the first abstract, was as follows. The legal fee appeared to be vested in John Salt, subject to a term of 1,000 years, which was represented to be vested in Sarah Powell.

The bill in this cause was filed on the 25th of November, 1834: and it appeared, by the supplemental *abstract, that John Salt died before the bill was filed, and that his father was his administrator, and his brother, William, his heir; and that, in July, 1838, letters of administration *de bonis non* of John Salt, were granted to Charles Salt. It further appeared by the supplemental abstract, that, by a deed dated the 18th of August, 1825, Sarah Powell declared herself to be a trustee of the term of 1,000 years, for John Salt. The question then is, whether the abstract which first of all disclosed those facts (1), disclosed a good title.

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(1) The whole of the above facts was not disclosed by the first abstract.

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It appears to me that, when an abstract shows that the equitable title is vested in the vendor, and that the legal estate in fee and a mortgage term are outstanding in certain persons, it shows a good title: and, though the owner of the legal estate in fee, or the termor and the person representing him, may subsequently die, yet that a good title is shown when it is shown that the vendor has the whole equity, and in what person the outstanding portion of the legal estate is vested.

The case of *Wynne v. Griffith* appears to me to be right, so far as it goes; because it is quite manifest that there was a grave question whether the lease and re-lease which had been executed by the four parties to whom the power of appointment was given, did vest the legal estate in the persons who were named as re-lessees in the release, there being words of appointment as well as words of release in the operative part of that deed. On the first argument in that cause, it was objected that it did not appear in whom the legal estate was vested; and Lord GIFFORD, M. R. thought that it was an objection to the title; and his Lordship thought it right *to send a case for the opinion of the Court of Common Pleas; and the learned Judges of that Court certified that the legal fee did not vest in the re-lessees (1). When the cause came on to be again argued on the return of the certificate, Lord GIFFORD thought it right to send the case to the Court of Queen's Bench (2); and the learned Judges of that Court certified in the same way as the Judges of the Court of Common Pleas had done; and then there was an end of the objection.

[*309]

The case of *Wynne v. Griffith* seems to me not to be inconsistent with the proposition, laid down by Sir Edward Sugden, that, if the seller has vested in him, legally or equitably, all the interest in the estate, it can not be objected, to the Master's report in favour of the title, that the legal estate is outstanding, although in a lunatic against whom no commission has issued; that is, the right to call for the legal estate being shown to be in the seller, and the legal estate being shown to be vested in A. B., it is no objection to the title that, on account of A. B. being a lunatic, some expense must be incurred in getting the legal estate out of him. But in *Wynne v. Griffith*, it was not certain in whom the legal estate was vested: and, in that respect, that case differs from the case put by Sir E. Sugden.

I thought it right to have the question in this case fully discussed,

in order that it might not be thought that the Court had disposed of it hastily. And my deliberate opinion is that I should be upsetting the clear rule of law if I were to decide in favour of the opinion expressed by the Master; and therefore I shall allow the exception (1).

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BOYDELL v. GOLIGHTLY (2).

(14 Simons, 327—347; S. C. 9 Jur. 2.)

1844.
Dec. 4, 16.

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V.-C.
[327]

A testator gave his freehold and copyhold estates and his personal estate to certain persons (whom he appointed his executors), in trust, to pay certain annuities and such sums as his trustees should think sufficient for the maintenance of his son John and his children (if he should have any), and to accumulate the residue of the rents and interest during the life of John, and, after John's decease, to stand seised of his real estates, in trust for John's first son and the heirs of the body of such first son, successively as they should be in priority of birth, and for the several and respective heirs of the body and bodies of every such son, and, for default of such issue, for A. for life, with remainder to his sons in tail, with remainder to B. and his sons, and to C. and D. and their sons in like manner, with remainder to his own right heirs for ever; and he declared that his trustees and executors should stand possessed of his personal estate after John's death, in trust for such person and persons, in the same order and succession, and for such and the same estates and interests as were thereby declared concerning his real estates, so far as the nature of the property, the rules of law and equity, the deaths of parties and other contingencies would admit of. The testator died in 1780; his son John was his heir-at-law and customary heir. John and A., B., C. and D. died without issue.

Held that the trusts subsequent to the trust for the first son of John were not void for remoteness, and that the ultimate trust of the personal estate, as well as of the freehold and copyhold estates, vested, on the testator's death, in his son John, as his heir-at-law at his death.

FRANCIS GILDART made his will dated the 10th of April, 1780, and [thereby devised and bequeathed all his real and personal estate to the defendant Thomas Golightly and other persons thereby appointed trustees and executors of his will, their heirs, executors and administrators, upon trust out of his personal estate and effects, and by absolute sale or by mortgage or other disposition of any part or parts of his freehold, copyhold and leasehold estates, as his said trustees or trustee for the time being should think proper, to raise money sufficient to pay his debts and funeral expenses and legacies; and

(1) The VICE-CHANCELLOR does not appear to have noticed that the first abstract in this case did not correctly show in whom the legal estate was actually vested when the suit was commenced, and that consequently his

decision was really inconsistent with the objection raised in *Wynne v. Griffith*.—O. A. S.

(2) *In re Loveman* [1895] 2 Ch. 348, 64 L. J. Ch. 567, 72 L. T. 816, C. A.

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upon further trust, by, with and out of the income and produce of his said real and personal estates, to pay certain annuities thereby given and subject thereto, during the life of his son John Gildart, to pay and apply such sums of money and in such manner as the trustees or trustee should think proper and sufficient, for the use, support and maintenance of his said son, and of his wife and family in case he should marry; and to invest the surplus income as therein mentioned, and he declared that all the monies which should be so invested, and the interest and dividends thereof respectively, should go and be applied to and for the benefit of such person, for such purposes and in such manner as the rest of his personal estate and effects and the interest and dividends thereof was thereafter given, bequeathed and disposed of; and, from and immediately after the decease of his said son, he declared that the trustees should stand and be seised and possessed of all his said real and personal estate and effects, which should not have been sold or disposed of for the purposes aforesaid and the produce and increase thereof howsoever invested or secured, upon the several trusts and for the several intents and purposes thereafter expressed and declared concerning the same respectively, that was to say, as to his said freehold and copyhold estates, in trust for the first son of the body of his said son John Gildart lawfully to be begotten, and the heirs of the body of such first son lawfully issuing, severally, successively and in remainder one after another as they should be in priority of birth, and for the several and respective heirs of the body and bodies of every such son lawfully issuing, the elder of such sons and the heirs of his body being always preferred and to take before the younger of them and the heirs of his and their bodies issuing (1), and, for default of such issue, in trust for all and every the daughters of the body of his said son lawfully to be begotten, if more than one, in equal shares as tenants in common, and for the several heirs of their respective bodies lawfully issuing (with cross remainders amongst them in tail); and, for default of such issue, out of the rents and profits of his said freehold and copyhold estates, to pay the several annuities or yearly sums thereafter mentioned; and, subject to the payment of the same several annuities and to such of the other trusts thereinbefore declared as should be then subsisting, in trust, after the death and such failure of issue of his said son as before mentioned, to pay all the residue of the income of his said freehold

(1) So in brief and copy of will.

and copyhold estates, to his brother the said Thomas Gildart, during his natural life: and, from and immediately after the decease of his said brother, and after the death and failure of issue of his said son as before mentioned, upon further trust, by sale, mortgage or other disposition of any part or parts of his said freehold or copyhold estates, to raise and pay the several sums of money thereafter mentioned to the several persons thereafter named, and subject thereto, in trust, as to all his said freehold and copyhold estates, for the first son of the body of his said brother Thomas Gildart, and for the heirs of the body of such first son lawfully issuing, with remainder in trust for the second, third and every other son of the body of his said brother lawfully issuing, successively, as they should be in priority of birth, and for the respective heirs of the body and bodies of every such son lawfully issuing; with remainder in trust for James Gildart, son of his nephew Johnson Gildart, and his assigns for his life, without impeachment of waste, with remainder in trust for his first and other sons successively in tail, with remainder in trust for Frederick Gildart, youngest son of his late brother Richard Gildart, deceased, and his assigns for his life, without impeachment of waste, with remainder in trust for his first and other sons successively in tail, with remainder in trust for his (the testator's) own right heirs for ever.

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And, as to all his leasehold and personal estate and effects, which should not be sold or disposed of by virtue of the trusts thereinbefore declared, the trustees or trustee were directed to hold the same from and after the decease of his said son, in trust for such person or persons, in the same order and succession, and for such and the same estates, rights and interests, and with such remainders or limitations over, and subject to the several annuities, charges, powers, provisoes, restrictions and declarations as were thereby limited or declared concerning his said freehold and copyhold estates thereby devised as aforesaid, so far as the nature of the said leasehold and other personal estate and effects, the rules of law and equity, the deaths of parties and other contingencies would admit of: but not so as to increase or multiply any charges thereinbefore created.

The testator then authorized his trustees, on the part of his son John, and he empowered James Gildart the younger and Frederick Gildart, when they should be respectively in possession of his freehold, copyhold and leasehold estates], to limit jointures not exceeding

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GOLIGHTLY. 300*l.* a year, out of his said estates, to any women whom they might respectively marry : and he declared that, if there should be any child or children of his son other than an eldest or only son, who should be entitled, for the time being, to the remainder in tail of the freehold and copyhold estates, and to the leasehold, chattelhold and other personal estates, under the limitations aforesaid, [his trustees should, after the death of his son, raise certain sums by way of portions for them as therein mentioned].

[336] The testator died on the 25th of May, 1780. His son John was his heir-at-law and customary heir. John died, a bachelor, on the 26th of August, 1818 : Thomas Gildart died in 1816 : James Gildart died in February, 1822 ; and Frederick Gildart, in April, 1841. None of them had a son living at or born after the death of the testator.

[*337] In July, 1841, the bill in *Boydell v. Golightly* was filed, stating that, on the death of Frederick Gildart, all the limitations and trusts contained in the will of Francis, previous to the limitation or trust to or for his right heirs, were spent, and such last-mentioned limitation or trust then vested in possession ; and stating also, *John's will, and various subsequent devises, bequests, and other acts in law, under which the plaintiffs claimed to be interested in John's real and personal estate ; and praying that his will might be established and the trusts of it performed ; and that it might be declared that all the freehold, copyhold and leasehold estates devised by the will of Francis, and all the trust-monies, stocks, funds, securities and other premises arising under the trusts of the same will, formed part of the residuary real and personal estate of John, [and praying consequential relief].

[*338] By the decree made * * on the 6th of December, 1843 (1), it was declared that the ultimate limitation or trust, contained in the will of Francis Gildart, the testator, to or for the right heirs of the testator, vested, on his decease, in John as his heir-at-law *and customary heir : and John's will was established, and the trusts of it were ordered to be performed : and it was referred, to the Master, to inquire and state, amongst other things, whether any of the annuities given by the will of Francis Gildart were still subsisting, and whether any of the legacies or any arrears of any of the annuities thereby given, remained unsatisfied ; and also who were or was the next of kin of Francis Gildart living at his

(1) Probably 1842 ; see 12 L. J. Ch. 187.

death, and whether such next of kin were living or dead, and, if dead, who were their personal representatives; and whether Francis Gildart left a widow, and whether she was living or dead, and, if dead, who was her personal representative. BOYDELL
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The Master reported that none of the annuities were subsisting, and that none of the legacies, nor any arrears of the annuities, remained unsatisfied: that Francis Gildart left Ellen Gildart his widow, and that she and his son John were his only next of kin at his death (1): that Ellen Gildart died in January, 1797, and that William Alexander Morland was her personal representative.

In April, 1844, the bill, in *Boydell v. Morland*, was filed for the purpose of bringing W. Alexander Morland before the Court, as claiming to be interested, as the representative of Ellen Gildart, in the trust funds in question in *Boydell v. Golightly*.

That cause and *Boydell v. Stanton*, now came on to be heard for further directions. * * *

Mr. James Parker and Mr. Bacon, for the plaintiffs: [339]

* * As John, or rather those who claim under him, are entitled to the real estate, we submit that they are entitled to the personal estate also; and that, as they take the absolute interest in the real estate, so they take the absolute interest in the personalty. [They cited *Gwynne v. Muddock* (2); *Wright v. Atkyns* (3); *Mounsey v. Blamire* (4); *Holloway v. Holloway* (5), and other cases; and distinguished *Gittings v. Macdermott* (6) and *Vaux v. Henderson* (7). The heir takes not as heir, but as *persona designata*.] [340]

Mr. Stuart and Mr. Heathfield, for the defendant Richard Golightly: [341]

* * The case of *Gwynne v. Muddock* governs this case.

If, however, the Court should hold that the personalty does not belong to John Gildart's estate, the next of kin of the testator must be entitled to it; and the widow is not one of the next of kin.

Mr. Whitmarsh and Mr. Lewin appeared for other defendants in the same interest as the plaintiffs. * * *

Mr. Koe, Mr. Teed, Mr. Wakefield, Mr. Osborne, Mr. Rolt, [342]

(1) This was a mistake. John was the sole next of kin.

(2) 9 R. R. 327 (14 Ves. 488).

(3) 13 R. R. 199 (19 Ves. 299).

(4) 28 R. R. 133 (4 Russ. 384).

(5) 5 R. R. 81 (5 Ves. 399).

(6) 39 R. R. 139 (2 My. & K. 69).

(7) 21 R. R. 193 (1 Jac. & W. 388).

BOYDELL and Mr. Kenyon appeared for the remaining defendants whose
 GOLIGHTLY. interest was the same as the plaintiffs. * * *

Sir Charles Wetherell and *Mr. G. W. Collins* for *W. Alexander Morland*, the personal representative of the testator's widow :

[*343] * * As the limitations over are to take effect after the failure of issue of the son, we submit that they are void on the ground of perpetuity : *Mellish v. Mellish* (1) ; *Doe v. Charlton* (2) ; *Monkhouse v. Monkhouse* (3). We cite those cases in order to show that, if *an estate for life had been limited to the testator's son, the Court might have implied, from the other words of the will, that he took an estate tail ; in which case the whole interest in the personalty, would have been vested in him : but, as he did not take an estate for life, the omission to limit the property to his younger sons, is fatal to the bequests over.

(THE VICE-CHANCELLOR: You construe the words : “ for default of such issue,” as comprehending the issue of persons not named to take as tenants in tail ?)

Yes : and we submit that the effect of that construction is that there is an intestacy as to the personal estate.

(THE VICE-CHANCELLOR: The personalty is disposed of by reference to the disposition of the realty : therefore, I can not deal with the personal estate, before I know whether the limitations over of the real estate are void or not. That is a legal question : do you wish to take the opinion of a court of law upon the point ?)

[*344] We shall be satisfied with your Honour's decision. * * We contend that the limitation in question, being a limitation of personalty after several limitations in tail, is void, according to *Tollemache v. Lord Coventry* (4) ; *Vaughan v. Burslem* (5) ; and *Gilb. on Uses*, *last edit., p. 124.

(THE VICE-CHANCELLOR: You have to consider what is the effect of the words : “ so far as the rules of law and equity, the deaths of parties and other contingencies will admit of.”)

(1) 26 R. R. 436 (2 B. & C. 520).

(4) 37 R. R. 260 (2 Cl. & Fin. 611).

(2) 1 Man. & G. 429.

(5) 3 Br. C. C. 101.

(3) 30 R. R. 135 (3 Sim. 119).

According to the cases, those words do not make the ultimate limitation valid.

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Fourthly, we submit that it is apparent, on the face of the will, that the testator did not intend his son to take anything more than the maintenance provided for him. Moreover, the trust for such person or persons &c. on which the counsel for the plaintiffs rely, is, by the express terms of it, not to arise until after the decease of the son. Consequently, your Honour cannot decide in favour of the plaintiffs, without doing violence to the testator's declared intention.

The other counsel in the cause were *Mr. Cooper*, *Mr. Parry* and *Mr. Elderton*, but they took no part in the argument.

THE VICE-CHANCELLOR :

I shall not trouble *Mr. Parker* to reply, because the case was opened some days ago, and, in the interval, I have had an opportunity of considering it.

With respect to the objection that all the limitations subsequent to the limitation to the first son of John Gildart, are void, I think that the true construction of the words, "for default of such issue," is, default of the issue which is there expressly mentioned, that is, the first son and the heirs of his body. It is too much to say that, because a sentence is obviously incomplete, it must be taken to be complete, and that, therefore, all the subsequent limitations are void. It is the duty of the Court to strive, not to defeat, but to support the *dispositions of a will; but it cannot, even for that purpose, supply words, however probable it may be that the omission of them was a mistake.

[*345]

The scheme of the will now under consideration, is this. It commences with a general devise of the testator's real and personal estates to trustees; and all the persons who are intended to be benefited by it, are to take by virtue of trusts subsequently declared. The testator's son is the first person named: he, however, is not to take as a tenant for life; but the trustees are to apply such part of the income of the real and personal property as they shall think sufficient, for his maintenance and support during his life. Then there is a limitation in favour of his first son and the heirs of the body of such first son. Then several limitations, of the real estate alone, are made to other persons for life and in tail; and the ultimate limitation is to the testator's own right heirs. The

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testator then, having previously disposed of the income of his leasehold and other personal property during the life of his son, declares that his trustees and executors, and the survivors and survivor of them, and the heirs, executors, administrators and assigns of such survivor, shall stand and be seised and possessed of and interested in his leasehold and personal property, from and after the decease of his son, in trust for such person and persons, in the same order and succession, and for such and the same estates, rights and interests, and with such remainders or limitations over, and subject to the several annuities, charges, powers, provisoes, restrictions and declarations limited or declared, by his will, concerning his freehold and copyhold estates thereby devised, so far as the nature of the said leasehold and other personal estate and effects, the rules of law and equity, *the deaths of parties and other contingencies will admit of. Now if, immediately after the death of the testator, a bill had been filed, by the son or by any of the other parties interested, for the purpose of having a settlement made according to the directions of the will (1), I apprehend that the Court, in order that the personal estate might be settled in the same manner as the real estate so far as the rules of law and equity would admit of, would have limited the personal estate to the persons who, as they came into existence, would become tenants in tail of the real estate, with limitations over in the event of their dying under the age of twenty-one, and without inheritable issue. And, as the Court would see that all those limitations might fail, it would then have to consider what ought to be done with regard to the ultimate trust of the personal estate. Now nothing can be more plain than that the testator meant that, by the operation of a trust to be executed by the trustees according to the rules of this Court, all the persons who were to take estates in the freehold and copyhold property, should take corresponding interests, as far as law would allow, in the personal estate: and, if it be the true construction of the will that those words which contain the limitation of the freehold and copyhold estates, in trust for the testator's own right heirs, designate the person who answered the description of the testator's heir-at-law at his death, it appears to me that the Court of Chancery would, of necessity, be bound to say that, in the settlement to be made immediately upon the testator's death, that person should be the person named to take the personalty.

(1) No settlement was directed to be made by the will; the trustees were directed to hold the property upon the trusts declared.

As the Master has made a mistake in reporting that the testator's widow was one of his next of kin, there ought to be a preliminary statement in the decree, that the counsel for all the parties agreed that John Gildart was the testator's sole next of kin.

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[347]

Declare that the ultimate trust declared by the testator, of his leasehold, chattelhold and personal estate and effects, vested, on his decease, in John Gildart, deceased, his heir-at-law.

GOLDIE v. GREAVES.

(14 Simons, 348—350.)

1844.
Dec. 5.

A testatrix bequeathed her personal estate to her sisters, or, in case of the death of either or any of them leaving issue, then the share of her so dying to go to such child or children, equally.

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V.-C.
[348]

All the testatrix's sisters died in her lifetime, without leaving any child or children living at the testatrix's death; but one of them left two grandchildren then living:

Held that the word, "issue," meant "child or children," and consequently that, in the events that happened, the testatrix's estate was undisposed of.

DOROTHY GREAVES made her will, dated the 15th of December, 1790, in the following words: "My will and mind is that my mother shall receive the half of the interest of all I die possessed of, for her life, and the other half of the interest of all I die possessed of, to be divided amongst my three unmarried sisters: but if any of my sisters should marry, I direct that she or they so married, shall not receive any of the interest of my fortune, but that her or their part of the interest which she or they would have received had she or they continued single, shall go to the unmarried sister or sisters for her or their lives: and I further direct that, if my mother should survive all her unmarried daughters, she shall receive all the interest of all I die possessed of, for her life: and I further direct that if any of my unmarried sisters shall survive my mother, she or they shall receive all the interest of all I die possessed of, for her or their lives: and it is my further will and mind that, at the death of all my unmarried sisters, all that I die possessed of shall then be equally divided amongst my brother, Edward Greaves, Esq., my sister, Jane Bradshaw, and my other sister or sisters that are or shall have been married, or, in case of the death of either or any of them leaving issue, then the share of him or her so dying to go to such child or children equally between them."

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[*349]

The testatrix's mother and brother and all her sisters died in her lifetime. Neither her brother nor any of her sisters left any issue living at her death, except that *Jane Bradshaw, one of her sisters, left two grandchildren, who, together with Darcy Lever and Mary Lever, the children of the testatrix's maternal uncle, were the next of kin of the testatrix at her death.

The testatrix died in 1838. Darcy Lever died afterwards.

The bill was filed by his executors, alleging that, under the circumstances above stated, the testatrix died intestate, and her personal representative was a trustee of her personal estate for her next of kin.

Mr. Bethell, Mr. James Parker, Mr. Renshaw, and Mr. Little, for the plaintiffs and the defendant Mary Lever, said that the testatrix had died intestate, not only as to the share of her personal estate which her brother, Edward Greaves, would have taken if he had survived her, but also as to the remainder of her personal estate; for the word, "issue," must be held to mean, "child or children."

Mr. Wakefield and Mr. Mylne for the grandchildren of Jane Bradshaw, contended that the meaning of the word, "issue," was not limited by the subsequent words, "child or children": *Wythe v. Thurlston* (1); *Dalzell v. Welch* (2); *Pruen v. Osborne* (3).

THE VICE-CHANCELLOR:

[*350] The testatrix herself has explained what she meant by the word "issue." After using that word, she uses *the expression, "such child or children." Therefore, she has made it indisputably plain that, by that word, she meant "child or children: "

Declare that, in the events that happened, the testatrix died intestate as to the whole of her personal estate.

(1) 3 R. R. 91 (3 Ves. 257), where the case is stated from Reg. Lib.

(2) 29 R. R. 110 (2 Sim. 319).

(3) 54 R. R. 338 (11 Sim. 132).

NEWBOLT *v.* PRYCE (1).

(14 Simons, 354—357; S. C. 8 Jur. 1112.)

A bequest was made to John Newbolt, second son of William Strangways Newbolt, vicar of Somerton. The vicar of Somerton was William Robert Newbolt. His second son was Henry Robert, and his third son, John Pryce: Held that John Pryce Newbolt was entitled to the legacy.

1844.
Dec. 13.
SHADWELL,
V.-C.
[354]

BRIDGET NEWBOLT, widow, being possessed of 2,800*l.* Consols, by her will dated in 1837, bequeathed as follows: "To my nephew John Newbolt, second son of the Rev. William Strangways Newbolt, vicar of Somerton, Somerset, I leave all my funded property in the Three per Cents. which I may die possessed of."

The testatrix died in 1843.

It appeared from the Master's report made in obedience to the decree at the hearing of the cause, that the name of the vicar of Somerton was William Robert Newbolt; that he was inducted into the vicarage in 1833; that no other person of the name of Newbolt had been either vicar or curate of the parish for fifty years prior to the date of the will; that William Robert Newbolt was the brother of the testatrix's late husband John Newbolt, under whose will she became entitled to the 2,800*l.* Consols; and that W. R. Newbolt had three sons living at the date of the will, of whom George Digby Newbolt was the eldest, Robert Henry Newbolt, the second, and John Pryce Newbolt, the third.

At the hearing for further directions, the questions were, first, whether John Pryce Newbolt (who was the plaintiff in the suit) was entitled to the Consols; second, whether Robert Henry Newbolt was entitled to them, and, third, whether the bequest was void for uncertainty.

[355]

Mr. Bethell and *Mr. Selwyn*, for the plaintiff, relied on the maxim: "*veritas nominis tollit errorem descriptionis*;" and cited *Doe v. Hiscocks* (2), and *Doe v. Huthwaite* (3).

Mr. Stuart, for Robert Henry Newbolt:

The plaintiff's baptismal name is not John, but John Pryce, consequently there is no *veritas nominis* with regard to him. The description applies correctly to my client. The testatrix has mistaken the baptismal name of the father, but is correct in her description of him. In *Doe v. Huthwaite*, the following passage in

(1) *Gillett v. Gane* (1870) L. R. 10 213, 47 L. J. Ch. 711, 38 L. T. 911.
Eq. 29, 39 L. J. Ch. 818, 22 L. T. 58; (2) 52 R. R. 748 (5 M. & W. 363).
Garland v. Beverley (1878) 9 Ch. D. (3) 3 B. & Ald. 632.

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Co. Litt. 3 a, was cited : “ So it is if lands be given to Robert Earl of Pembroke, where his name is Henry ; to George Bishop of Norwich, where his name is John ; and so of an abbot ; for, in these and the like cases, there can be but one of that dignity or name ; and, therefore, such a grant is good, albeit the name of baptism be mistaken.” In *Pitcairne v. Brase* (1), there was a devise to William Pitcairne, the eldest son of Charles Pitcairne of Twickenham. The name of the eldest son was Andrew ; but it was held to be a good devise to him : so that the description was preferred to the name.

THE VICE-CHANCELLOR :

[*356] In that case there was no son of the name of William. *The question here is whether a son is not more likely to be called by one of his names, than by a name that does not belong to him at all. The directions given by the decree are not sufficiently full : there ought to have been an inquiry whether the testatrix was not in the habit of calling one of the sons (whom, by the bye, she inaccurately calls her nephews) by the name of John.

Mr. Wood, for the testatrix's next of kin :

The words of the will do not apply either to the second or to the third son : and your Honour can not hold that the third son is entitled to the legacy, without striking out the words, “ the second son ;” and you can not hold that the second son is entitled, without striking out the word, “ John ;” but you are not at liberty to strike out any of the words ; and, therefore, the bequest is void for uncertainty. * * In this case, there is nothing whatever to show which of the two claimants was the person intended by the testatrix.

THE VICE-CHANCELLOR :

[*357] The question is whether a person whose baptismal *name is John Pryce, is not correctly described by the name of John.

I think that there is a sufficient *veritas nominis*, to take away the *error descriptionis*.

(1) Finch's Rep. 403.

THE DUKE OF LEEDS *v.* LORD AMHERST.

(14 Simons, 357—368; S. C. 15 L. J. Ch. 351.)

[AFFIRMED on appeal, as reported in 2 Phillips, 117; 10 Jur. 956.]

1846.
April 21, 25,
27.
May 1, 25.SHADWELL,
V.-C.

[357]

1846,

July 4.SHADWELL,
V.-C.

[369]

BROWNE *v.* STOUGHTON.(14 Simons, 369—378; S. C. nom. *Broune v. Houghton*, 15 L. J. Ch. 391;
10 Jur. 747.)

A testator devised his estates in trust for the plaintiff for life, with remainder to his first and other sons in tail male, with remainders over; and directed that, if any person for the time being entitled to the possession of the estates should be under twenty-one, the trustees should, so long as the person so entitled should be under twenty-one, receive the rents and apply a competent part thereof for his maintenance, and invest the surplus, in their names, on Government or real security, and, from time to time, receive the income thereof and invest the same in like securities, so that the same might accumulate, and should stand possessed of such surplus rents, together with the accumulations thereof, upon trust to invest the same, from time to time, in the purchase of real estates, to be forthwith settled to the uses and upon the trusts thereby declared of the devised estates:

Held that the trust was void for remoteness.

JOHN BROWNE, Esq., by his will, dated the 20th of April, 1812, devised part of his estates unto and to the use of James Stoughton and Thomas Church and their heirs, upon trust for the plaintiff, J. T. Graver Browne, the eldest son of G. D. Graver, during his life, subject to impeachment of waste for cutting down timber trees for any purpose whatsoever; and, after the plaintiff's decease, upon trust for his first and other sons, successively, in tail male, and, in default of such issue, upon the several further trusts in the will mentioned (1): and the will provided that if, by any event, the said manors, lands and hereditaments should become subject, in possession, to any trust, before the person or persons in whose favour such trust was declared, should be in existence, then that the trustees should receive the rents and profits thereof, and pay over and account for the same to the person or persons who would be entitled to the possession of the manors, lands and hereditaments if the other person or persons having the prior trust thereof, should never come into existence, up to and until the last-mentioned person or persons should come into existence, or the possibility of his or their existence should have ceased.

And the will further provided that if any person for the time being beneficially entitled to the possession or to the receipt of the

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(1) The further trusts were not set forth in the bill.

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 STOUGHTON,

rents, issues and profits of any of the estates thereinbefore devised, should be under the age of twenty-one years, the trustees, and the survivor of them and the heirs of such survivor, should, so long as the person entitled as aforesaid should be under that age, receive the rents, issues and profits of the estates to which he or she should be entitled, and apply a competent part thereof for his or her maintenance, education and advancement, and invest the residue and surplus of such rents and profits in the names of the trustees, and the survivor of them his executors or administrators, on Government or real security; and from time to time receive the annual income and produce of the said investments, and again invest the same in such securities as aforesaid, to the intent and so that the same might accumulate in the nature of compound interest; and should stand possessed of such surplus of the rents and profits, together with the accumulations thereof, upon the trusts and for the purposes thereafter declared, nevertheless with full power, for the trustees and the survivor of them and his heirs, to apply the savings of any preceding year or years, in and towards such maintenance, education and advancement as aforesaid in any succeeding year or years: and the testator declared that the trustees, their executors and administrators, should stand possessed of the residue or surplus of the rents and profits of the estates, thereinbefore devised to them and their heirs in trust for the plaintiff with remainders over as aforesaid, which should be received, by the trustees and their heirs, during the minority of the person or persons for the time being entitled, in possession, to the same estates or to the receipt of the rents and profits thereof, together with the *interest and accumulations thereof, after the applications aforesaid and thereafter mentioned, upon trust to invest the same or any part or parts thereof, from time to time as often as proper opportunities should offer, in the purchase of freehold or copyhold estates situate in England, to be approved of by some writing under the hand of the person who would be tenant for life or in tail male thereof if the same were then purchased, if such person should be of age, but, if such person should be under age, then that every such purchase should be at the discretion of the trustees and the survivor of them, his executors and administrators, and that the estate and estates so to be purchased, should be, forthwith, settled to the uses and upon the trusts thereby limited and declared concerning the estates thereby devised to the trustees and their heirs in trust for the

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plaintiff for life with remainders over as aforesaid, or as near thereto as the nature and quality of the estates so to be purchased and intervening circumstances, would admit of. BROWNE
STOUGHTON.

The testator died in 1814; at which time the plaintiff was only eight years of age. During his minority, the trustees laid out the rents of the estates, after providing for his maintenance and education, in the purchase of other estates, which were conveyed to them upon the trusts of the will.

The bill, which was filed against the heir of Stoughton (who survived Church), and against the plaintiff's only son, who was entitled to the first estate of inheritance in the devised estates, alleged that the trusts and directions, contained in the will, for the accumulation and investment of the surplus rents of the estates during the minority of the person for the time being entitled to the *possession, or to the receipt of the rents and profits of the estates, was void as being too remote; and that the plaintiff was absolutely entitled to the purchased estates: and it prayed for a declaration to that effect, and that the purchased estates might be conveyed to the plaintiff accordingly. [*372]

Mr. Bethell and Mr. Messiter, for the plaintiff, cited *Lord Southampton v. The Marquis of Hertford* (1), and *Marshall v. Holloway* (2). In the latter case Lord ELDON said: "The true doctrine seems to be, that, of a trust for accumulation, which, prior to Lord Loughborough's Act, would have been good, so much as is now within the Act, will be good, but the excess will be bad; but, if there be a trust for accumulation, and part of it would have been bad before the Act, that part remains bad notwithstanding the Act." * * * [374]

Mr. James Parker and Mr. Fleming, for the plaintiff's son: [375]

* * In *Lord Southampton v. The Marquis of Hertford* * * [376]
the enjoyment of the accumulated fund was to remain in suspense until there should be a person in possession who should be free from the disability of infancy; an event that might not happen for a couple of centuries. In *Marshall v. Holloway* (2), also, the destination of the accumulated fund, was void for remoteness; and Lord ELDON says that he cannot distinguish that case from *Lord Southampton v. The Marquis of Hertford*. The decisions in those cases would have been the same if the trust had been confined to the rents to be received during the first year after the testator's

(1) 13 B. R. 18 (2 V. & B. 54).

(2) 19 B. R. 94 (2 Swans. 432).

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death. It was not the trust for accumulation, but the ultimate destination of the fund, that transgressed the law against perpetuity; and that circumstance constitutes the difference between the cases cited and the case now before the Court. Here the ultimate destination of the fund, is good.

[*377]

Secondly, we submit that the trust in this case, though one in point of language, is, in fact, a succession of separate and distinct trusts, to continue during the infancy of the first tenant in for life, during the infancy of the first tenant in tail, and during the infancy of every *succeeding tenant in tail. There being then a succession of trusts, some of which are good, and the rest, bad, there is nothing to prevent the Court from separating the good from the bad, and giving effect to them: *Ferrand v. Wilson* (1), *Phipps v. Kelynge* (2).

THE VICE-CHANCELLOR:

Sir WILLIAM GRANT, in his judgment in *Lord Southampton v. The Marquis of Hertford*, says that, under the circumstances of the case, Lord CAMDEN had no occasion to consider whether the trust for accumulation in *Phipps v. Kelynge*, was good or bad (3).

Mr. Follett appeared for the heir of James Stoughton.

THE VICE-CHANCELLOR (without hearing the reply):

This seems to me to be the simplest case possible.

[*378]

The testator, having devised the legal estate in fee to trustees, has directed them to hold it in trust for the eldest son of G. D. Graver for life, with remainder to his first and other sons in tail male, with remainder to the second son of G. D. Graver for life, with remainder to his first and other sons in tail male, with remainder to the third son of G. D. Graver for life, with remainder to his first and other sons in tail male, with remainders over. Then he says: "that if any person for the time being beneficially entitled to the possession or to the receipt of the rents, issues and profits of any of the estates hereinbefore devised, shall be under the age of twenty-one years, the said James Stoughton and Thomas Church *and the survivor of them and the heirs of such survivor, shall, so long as the person entitled as aforesaid shall be under the age of twenty-one years, receive the rents, issues and profits," and so on. Is it not perfectly manifest on the face of those words, that, by possibility, the trust may go on without limit?

(1) 67 R. R. (4 Hare. 344).

(3) See 13 R. R. 20, 21 (2 V. & B.

(2) 13 R. R. 16 (2 V. & B. 57, note (b)). p. 62).

It never occurred to my mind that the case of *Lord Southampton v. The Marquis of Hertford* was determined with reference to what was to be done with the fund accumulated: and Lord ELDON's language in *Marshall v. Holloway*, is express and clear.

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Declare that the trust for accumulation is wholly void, and that the plaintiff is entitled to the rents of the devised estates, from the death of the testator, and direct the trustees to convey the estates which have been purchased with those rents, to the plaintiff and his heirs.

WINCH v. BRUTTON (1).

(14 Simons, 379—390; S. C. 8 Jur. 1086.)

1844.
Dec. 14.

Where a testamentary gift is expressly made absolute a precatory trust will not be impressed thereon by any expression of the testator's desire or confidence that the donee will make provision thereout for another person.

SHADWELL,
V.-C.
[379]

THE bill, which was filed by Elizabeth Winch, an infant, stated that William Bridges, the plaintiff's grandfather, being seised of real estates and possessed of personal estate of considerable value, made his will, dated the 6th of May, 1840, the material part whereof was as follows: "Whereas I am possessed of or otherwise well entitled to some considerable property and effects, which are now embarked in, and form part of the capital, stock in trade or business of a silk manufacturer, which I carry on in copartnership with Messrs. Campbell, Harrison and Lloyd, in Friday Street, London; and *whereas I am desirous of arranging my worldly affairs, and of making a suitable provision, by will, for my dear wife, Elizabeth Bridges, as well as for my daughter and grandchild respectively, although, by the Statute of Distribution they would be equally well taken care of otherwise; but, in order to manifest the deep affection and unbounded confidence I have and entertain towards my dear wife, Elizabeth Bridges, such as I know she will feel for me, and believing that she will be actuated by the most maternal regard towards our child, I hereby intend to mark such confidence accordingly: now, therefore, I do, hereby, give and bequeath unto my said dear wife, Elizabeth Bridges, all and singular whatever property and effects I may happen to die possessed of, either in possession, reversion, remainder or expectancy; to hold the same, unto my said dear wife, to and for her own use, benefit and disposal absolutely, except the bequest to my daughter,

[*380]

(1) *Eaton v. Watts* (1867) L. R. 4 Eq. 151, 16 L. T. 311.

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[*381]

well knowing my sentiments as she does, and implicitly relying upon her attachment to our daughter and grandchild ; moreover believing that she will act, generally, under the immediate advice and judgment of my executors hereinafter named. And I do further will and direct that my said executors shall and do, as soon as conveniently may be after my decease, call in, dispose of and convert into money whatsoever share, in the said copartnership business of a silk manufacturer, I may be entitled to under and by virtue of and subject to a certain deed of copartnership-arrangement, executed between us accordingly ; and, likewise, call in all and singular other my personal estate and effects whatsoever ; and shall and do, after payment thereof, in the first place, of my just debts, funeral and testamentary expenses, and of the sum of 500*l*. to my daughter Elizabeth at present the wife of William Winch (which legacy to my daughter I direct *to be paid within two months after my decease, and to be for her sole and separate use, independently of her husband, and upon her receipt alone), lay out and invest the produce of my said effects, in the public stocks or funds, or upon Government or real securities in England, in her own name, or jointly with my said executors, as may be deemed most expedient and agreeable to my wife ; with full power, from time to time, to vary or transpose the same stocks, funds and securities respectively : to hold the same and every part thereof, with the dividends and interest arising therefrom, unto my said dear wife, to and for her own absolute use, benefit and disposal : and whereas I have hereby manifested abundant proof of entire confidence in my said dear wife, by thus giving her the sovereign control over the whole of my property, for her sole use and benefit, which she will duly appreciate accordingly, but, in so doing, I, nevertheless, earnestly conjure her, under the advice of my executors, to proceed, forthwith, to make ample provisions, by deed or will, for our only child and grand-daughter, and to take especial care that her present husband shall have no control over her property, in any manner whatsoever, either directly or remotely. All the rest, residue, and remainder of my estate and effects, I give unto my said dear wife : and I nominate and appoint her, with my friend, Robert Brutton, of Bethnal Green, in the county of Middlesex, Esq., and my partner, Robert Harrison, of Friday Street aforesaid, executrix and executors of this my will, allowing them to retain or reimburse themselves all costs, charges, damages, fees to counsel for any advice, and other legal expenses, which they,

respectively, shall sustain, or be put to in or about the execution thereof; my said executors being only responsible for each other's acts; and hereby revoking all *former wills, I declare this only to be my last will and testament."

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*
BRUTTON.
[*382]

The testator made a codicil bearing date the 15th of July, 1843, and in the words following: "I give and bequeath, unto my servant, Ann Witney, as a reward for her long and faithful services, the sum of 400*l.* sterling free from any deduction on account of legacy duty, which I direct shall be paid and discharged out of my personal estate."

The testator died on the 17th of August, 1843, leaving the plaintiff, his only grandchild, and her mother, Elizabeth Winch, the wife of William Winch, his only child him surviving. The testator's widow died between the date of the will and the date of the codicil.

Brutton and Harrison proved the will and codicil, possessed themselves of the testator's personal estate, and entered into the receipt of the rents of his real estates, and they were still in such possession or receipt; but they had not sold the testator's share in the copartnership business mentioned in his will.

The bill insisted that, subject to the payment of the testator's debts, funeral and testamentary expenses, and of the legacies of 500*l.* and 400*l.*, a trust was created of the residue of the testator's real and personal estate, including the produce of his share in the copartnership business, in favour of the plaintiff and her mother, [and the bill prayed consequential relief].

William Winch, who was living separate from his wife, demurred to the bill for want of equity.

[383]

Mr. Bethell and *Mr. Wright*, in support of the demurrer. * * *

Mr. Stuart and *Mr. Grimshaw*, for the plaintiff.

[384]

[Numerous cases of precatory trust were cited by counsel, but none of those cases were referred to in the following judgment.]

THE VICE-CHANCELLOR [after disposing of a question which is not material for the purpose of this report, said] :

[385]

The principal question depends on the language which the testator has used in his will and codicil. With respect to those instruments, this general observation may be made, namely, that

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f.
BRUTTON.

there is considerable confusion in the language of the testator, and a degree of uncertainty and misconception as to what the law would be. I only mention this generally, because one must take every thing into consideration when one is attempting to do what is the duty of the Court, namely, to construe the will as well as one can.

[His Honour then read the earlier part of the will, including the direction for conversion of the testator's share in the partnership business and the gift of the invested proceeds to his wife for her own absolute use, and said:]

[388] I think that those words: "to and for her own absolute use, benefit and disposal," coupled with the former words, which show that she was to have, if she pleased, the absolute dominion over the whole fund (for it was to stand in her name), put it beyond dispute, that there is a complete gift, to the wife, for her own benefit.

Then the question is whether that gift is cut down by what follows: "and whereas I have, hereby, manifested abundant proof of entire confidence in my said dear wife, by thus giving her the sovereign control over the whole of my property for her sole use and benefit, which she will duly appreciate accordingly; but, in so doing, I nevertheless earnestly conjure her, under the advice of my executors" (it is remarkable that there should be this inconsistency here) "to proceed, forthwith, to make ample provisions, by deed or will." It is remarkable that the power to make the provision is, unquestionably, given to the wife so that she may make it by will; and yet the words are: "to proceed, forthwith, to make ample provision, by deed or will, for our only child and grand-daughter, and to take especial care that her husband," (meaning the husband of the *child) "shall have no control over her property." The expression is: "I conjure her, under the advice of my executors, to proceed" (I leave out the word forthwith) "to make ample provision:" and I wish to have it made out, if it can be made out, that, where there has been a gift of the whole of the property to the wife, the words: "ample provision," are equivalent to: "my said real and personal estate." Supposing, however, that there had been any ambiguity about the effect of the first part of the will, there follows a sweeping gift of everything to the wife, without any trust whatever: "all the rest, residue and remainder of my estate and effects I give unto my said dear wife." Therefore, if anything could demonstrate the intention of the testator to give everything to his wife, this would show it: and, if there should be

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any such ambiguity, in the former part of the will, as will prevent it from taking effect according to the testator's intention, he has removed that ambiguity, because he has given everything to his wife.

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r.
BRUTTON.

[The remainder of the judgment deals with points not material to this report.]

Demurrer allowed.

FREER v. RIMNER (1).

(14 Simons, 391.)

1844.
Dec. 18.

SHADWELL,
V.-C.
[391]

Where conditions of sale provided that no bidding should be retracted, it was held that a bid made by the solicitor of a mortgagee, whose consent to the sale had been given, could not be retracted before the hammer fell.

UNDER the decree, an estate was sold by auction, with the consent of a mortgagee, who was not a party to the suit. The highest bidder was the solicitor of the mortgagee; and the estate was knocked down to him. He now moved to be discharged from his purchase, on the ground that he retracted his bidding before the hammer fell. The conditions of sale provided that no bidding should be retracted.

The VICE-CHANCELLOR refused the motion with costs, on the ground that, as the estate had been sold with the mortgagee's consent, his solicitor ought not to be allowed to defeat the sale.

Mr. Stuart and Mr. Cankrien moved.

Mr. Bethell, Mr. Wood, Mr. Rolt, Mr. Bazalgette and Mr. Cook, opposed the motion.

WILSON v. WILSON.

(14 Simons, 405—425.)

1845.
Jan. 20—29.
Feb. 1, 11.

SHADWELL,
V.-C.

[AFFIRMED on appeal by the House of Lords, as reported in 1 H. L. C. 538.]

(1) Since a bid displaces a previous bid, the withdrawal of a bid may seriously prejudice the vendor, and it is not easy to see why a condition intended to protect the vendor from this injury should not be effectual.—
O. A. S.

[405]

1845.

Feb. 13.

BROWN *v.* COLE (1).

(14 Simons, 427—428; S. C. 14 L. J. Ch. 167; 9 Jur. 290.)

SHADWELL,
V.-C.

[427]

A bill to redeem a mortgage, filed before the mortgage has become absolute at law, is demurrable, notwithstanding the mortgagor may have tendered to the mortgagee the principal money, together with interest up to the day named in the proviso for redemption.

BILL to redeem a mortgage for a term of years, made on the 1st of April, 1844.

The proviso for redemption stipulated that the mortgagee should re-assign the mortgaged premises, on being repaid the money lent, on the 1st of April, 1845, with interest in the meantime, by quarterly payments.

The mortgagor, having had an advantageous offer, for the purchase of the premises shortly after the mortgage was made, tendered, to the mortgagee, the amount of the principal, and of the interest up to the 1st of April, 1845, together with a re-assignment of the mortgaged premises; but the mortgagee would neither accept the money nor execute the deed: in consequence of which the bill was filed.

The defendant demurred to the bill for want of equity.

[428]

The VICE-CHANCELLOR allowed the demurrer, on the ground that it was contrary to the practice of the Court to decree the redemption of a mortgage, before the day appointed for that purpose had arrived.

Mr. Stuart and *Mr. Miller* for the demurrer.

Mr. Wakefield and *Mr. Steere* for the bill.

1845.

Feb. 14.

AMIES *v.* SKILLERN (2).

(14 Simons, 428—431; S. C. 14 L. J. Ch. 165; 9 Jur. 124.)

SHADWELL,
V.-C.

[428]

A testator bequeathed his residuary personal estate to trustees, in trust to pay the interest to and amongst all the children of his brother, for their respective lives, and after their deaths, as they should respectively die, he gave the principal of their respective shares to their respective children; and, if any of his brother's children should die without leaving any child, he gave their shares to their surviving brothers and sisters for life, and, afterwards, to their respective children, in the same manner as their

(1) *Bovill v. Endle* [1896] 1 Ch. 648,
65 L. J. Ch. 542.

(2) *In re Hudson* (1882) 20 Ch. D.
406. 51 L. J. Ch. 455 46 L. T. 93.

original shares were given. One child of the testator's brother, had three children, one of whom was born after the testator's death; and that child and another died in their parent's lifetime.

AMIES
v.
SKILLERN.

Held that, on the death of the parent, the surviving child became entitled to the whole share of which the parent had been tenant for life.

A TESTATOR bequeathed his residuary personal estate to his executors, in trust to invest it in Government or real securities, and to pay the interest to and amongst all the children of his brother Isaac, for their respective lives; and, after their deaths, as they should respectively die, he gave the principal of their respective shares to their respective children; and, if any of his brother's children should die without leaving any child, he gave their shares to their surviving brothers and sisters for life, and, afterwards, to their respective children, in the same manner as their original shares of the residue were given.

The testator's brother had a son and three daughters, all of whom were living at the testator's death. One of the daughters married George Boyce and had three children, two of whom died in their mother's lifetime, one an infant (who was born after the testator's death), and the other having married the defendant John Kempster and left one child, the defendant Margaret Kempster.

[429]

The bill was filed by Ann Amies, Mrs. Boyce's surviving child, and William Amies, her husband, insisting that Ann Amies became entitled, on the death of her mother, to one-fourth of the trust-fund, as being the only child of her mother then living.

The question was whether Mrs. Boyce's children were joint-tenants or tenants in common with each other, of the fourth share of the trust-fund to which their late mother had been entitled for life.

Mr. Rogers and *Mr. Rolt*, for the plaintiffs, William Amies and Ann his wife, contended that, under the will, the children of each child of the testator's brother Isaac, were joint-tenants, *inter se*, of the shares of the testator's residuary estate to which their respective parents were entitled for life; and that, nothing having been done to sever the joint-tenancy between the children of Mrs. Boyce, the plaintiff, Ann Amies, as the sole surviving child, became entitled, on her mother's death, to the whole of the share in which her mother had had a life interest.

Mr. Glasse appeared for W. Skillern, the surviving trustee of the will.

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v.
SKILLERN.
[430]

Mr. Wood and *Mr. Cayley Shadwell*, for the defendant John Kempster, contended, first, that the word, "respective," in the gift to the children of the children of the testator's brother, made them tenants in common of the principal of their respective parents' shares: secondly, that the shares of Mrs. Boyce's children vested in them at different times; and, consequently, they, at least, were tenants in common of the principal of their parents' share: *Woodgate v. Unwin* (1): thirdly, that, if there was a joint-tenancy between Mrs. Boyce's children, it was severed by the marriage of Mrs. Kempster.

THE VICE-CHANCELLOR:

Mrs. Kempster's husband did not reduce his wife's share into possession, in her lifetime.

Mr. L. Shadwell, for the defendant Margaret Kempster, referred to Co. Litt. 185 a, where it is said that if two females are joint-tenants of a lease for years, and one of them marries and dies, the term shall survive to the other; but that it is otherwise with respect to personal goods: *Bracebridge v. Cook* (2).

THE VICE-CHANCELLOR:

Lord Coke's position would apply, if the subject of the gift in this case, had been a flock of sheep, or any other chattel in possession, and not a mere chose in action.

The words: "to their respective children," following, as they do, the words: "the principal of their respective shares," show only that the children of each child of Isaac, were to be tenants in common, as a class (3); *but there is nothing, in the will, to show that the children of any one child of Isaac, were to take the share of which their parent was tenant for life, otherwise than as joint-tenants: and they were not to take vested interests in that share, until the death of their parent.

The consequence is that Mrs. Amies is entitled to the whole of her mother's share.

Declare that, according to the true construction of the will, the

(1) 33 R. R. 101 (4 Sim. 129).

(2) Plowd. 418.

(3) At first sight this expression seems inconsistent with the subsequent decision, but the units of the class here described as tenants in common

are families of children, not the individual children, for the children composing each unit are afterwards held to be joint tenants *inter se*.—O. A. S.

children of Ann Boyce took [her share] as joint-tenants; and that the plaintiff, Ann Amies, as the only surviving child of the said Ann Boyce, is entitled, as surviving joint-tenant, to the whole [share].

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v.
SKILLERN.

LOCKWOOD v. ABDY (1).

(14 Simons, 437—443; S. C. 9 Jur. 267.)

1845.
Feb. 26.

A sub-agent is not accountable to the original principal, nor does the circumstance that he has prepared and submitted accounts as if he were so accountable enable the original principal to sue the sub-agent.

SHADWELL,
V.-C.

[437]

THE plaintiff was entitled to large real estates in the county of Essex. In 1833, he was in embarrassed circumstances and obliged to go abroad. The defendant, Abdy, a clergyman, was an old and intimate friend of the plaintiff. By a power of attorney, the plaintiff appointed Abdy his agent, with full power to manage his estates, receive his rents, make proper allowances to tenants, and with an express authority to appoint proper persons to act as agents under him. The defendant Abdy retained G. B. Andrews, an attorney and solicitor practising in Essex, and employed him in receiving the plaintiff's rents and in the management of the estates.

The bill was filed against both Abdy and Andrews, and prayed an account against both, and that Andrews's bills might be taxed, and that a sum of 208*l.*, which was charged by Andrews as a poundage of five per cent. on the amount of rents collected, might be disallowed. The bill charged the defendants with various acts of misconduct in the management of the estates, and, particularly, with having pulled down a mansion-house, and sold the materials.

The answers of both the defendants, stated that Andrews was retained, by Abdy, as his attorney.

In Andrews's books, items were entered and charged as against the plaintiff; and the evidence (which consisted, *in part, of the letters which passed between the plaintiff and the defendants during the agency) showed that Andrews had prepared the power of attorney, and had various interviews with the plaintiff, and advised him as to the management of his affairs. The accounts between the plaintiff and Abdy had never been settled; but they had been made out and rendered by Andrews, and were intituled as accounts between Abdy and Andrews as the agent, by power of attorney, of the plaintiff Mr. Lockwood. Abdy acted, gratuitously, in the agency,

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(1) The reporter is indebted to one above note of the facts of the case and of the counsel in the cause for the of the argument.

LOCKWOOD
*
ABDY.

and had not received or even claimed any remuneration whatever. An account was opened with Gosling & Co., bankers, in the joint names of Abdy and Andrews, and the plaintiff's rents were paid into the Bank, to that account; but the answers stated that the account, although kept in the joint names, was Abdy's alone, and that he alone had control over the money paid in.

Mr. Bethell and *Mr. Wright*, for the plaintiff, contended that the correspondence, the entries in Andrews's books, and the paying in of the rents to the joint account, proved that Andrews and Abdy were the joint agents of the plaintiff.

Mr. Stuart and *Mr. Pryor*, for the defendant Abdy :

[439] * * Between plaintiff and Andrews there was no such privity as could maintain this bill.

* * * * *

[*440] *Mr. James Parker* and *Mr. Goodere*, for the defendant Andrews, said that there was no evidence that Andrews had been retained for the plaintiff; but it was expressly stated, in the answers of both defendants, that Andrews *was retained by Abdy, and acted as his attorney and agent. The entries in Andrews's books and the passages relied on in the correspondence, were all explained by the fact that, although Andrews acted under Abdy and was accountable to Abdy alone, yet the transactions related to the plaintiff's property; that *Stephens v. Badcock* (1) showed that there was no privity between the plaintiff and Andrews, and that the plaintiff could not have maintained any action, against Andrews, for money had and received.

Mr. Bethell, in reply, insisted on the entries in Andrews's books, in which the plaintiff was debited; on the passages in the letters, and on the account opened with Gosling & Co. in the joint names of the defendants.

THE VICE-CHANCELLOR :

This is a most important case in respect of the general question which is involved in it.

The bill is filed, by *Mr. Lockwood*, against *Mr. Abdy*, who was constituted his attorney by a power of attorney, with an express authority, not then brought to the notice of *Lockwood* for the

first time, to appoint a sub-agent to assist him. I say that that authority was not then, for the first time, brought to the notice of Mr. Lockwood; because it was given in consequence of letters which had been written previous to the execution of the power of attorney.

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It has been propounded, as a general proposition, that it is the right of a party who has appointed a *person to act for him and who was authorized by him to appoint an assistant agent, to file a bill against them both, in respect of that which is, strictly, the agency of one. That proposition, if it be maintained, will have most extensive consequences; because, in cases where gentlemen act as trustees, they must, of necessity, employ solicitors, receivers, bankers, and agents of various kinds: and is it to be said that, because the trustee is responsible to his cestui que trust, therefore the cestui que trust is justified in filing a joint bill against the trustee and against every individual employed by him in the execution of the trust, who may have received money belonging to the cestui que trust, and dealt with it according to the direction of the trustee? It seems to me that it would be a most fearful thing to establish such a proposition. I admit that, if a case were brought forward in which it was distinctly made out that the trustee and his agent had been corruptly abusing the power which the cestui que trust had vested in the trustee, the Court would interfere; but, in this case, there is not a particle of evidence that Mr. Abdy has himself acted corruptly, or that he has countenanced any corrupt act done by the gentleman whom he employed as his agent. And (having attended to the language which is found in the letters of Mr. Lockwood) I cannot but regret that the suit has proceeded to this extent. I find those letters replete with language the most forcible that can be used to express his early attachment, his continued affection and his gratitude to Mr. Abdy for the way in which his affairs had been administered. Indeed, it appears from one of the letters which have been given in evidence, that he himself regretted that the suit had ever been instituted; and it seems to me to be most extraordinary that he should have permitted the suit to go on to *its present stage. With that, however, I have nothing to do. I have only to decide the general question.

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[*442]

Now it is quite clear, on the face of the evidence, that Mr. Abdy was appointed the general agent, and that he had express authority to appoint a subordinate agent. It is plain, too, on the evidence, that not only was Andrews originally proposed to be, but that he was actually retained to act as the solicitor for Mr. Abdy; and, that

LOCKWOOD being so, and there being no proof of corruption, my opinion is that
r. Mr. Andrews is responsible to Mr. Abdy alone.
ABDY.

No case can have been argued with more ingenuity and ability than this case has been by *Mr. Bethell*: and it occurred to me, I admit, that if any person were to read the letters which passed between Mr. Andrews and the solicitors of Mr. Lockwood, without knowing what the facts were, he would say: How can Mr. Andrews refuse to account? But my opinion is that, if a person has said in a letter: "I will submit my accounts," that does not bind him unless he was proved to be in a situation in which he was bound, by law, to submit his accounts. I have often had occasion to see, in this Court, what is the effect of a long correspondence; and my opinion is that a man's mind may be as completely mesmerized by a long correspondence, as by the actual operation itself. A correspondence may be conducted to such a length, with such dexterity, and with such puzzling questions, that, at last, a man might admit almost anything against himself, and undertake to do anything rather than continue the correspondence.

[His Honour then read several passages from letters which had
[*443] passed between the plaintiff's solicitors and *Mr. Andrews, some of which tended to show, as his Honour thought, that Mr. Andrews considered himself liable to account to the plaintiff.]

Then the usual consequence of a long correspondence followed, namely, a bill in Chancery was filed, which contained all sorts of accusations, principally against Mr. Andrews, of which not a particle of proof is given; and there is nothing whatever to prove (though there might have been the strongest proof, if the facts would have warranted it) that Mr. Abdy and Mr. Andrews had so acted as to raise a case of joint liability. I do not sit here to enter into the question whether the accounts are fair and proper, or whether, if such accounts had been produced in a proper case as between Mr. Lockwood and Mr. Andrews, the Court would not at once have said such and such items ought to be disallowed. I have here to determine the preliminary question—Shall I go into the accounts at all in this suit? And my opinion is, upon the ground to which I have alluded, that this suit is unsustainable, and the bill must be dismissed with costs (1).

(1) The bill was dismissed as against Abdy as well as Andrews, with costs.

BUTCHER *v.* JACKSON (1).

(14 Simons, 444—456 (2).)

1845.

March 5, 6.

SHADWELL,
V.-C

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Residuary personal estate was bequeathed in trust for A. for life, and, after his death, for his children, as he should appoint; and, in default of appointment, for the children equally on attaining 21 years of age with remainder over. Before A. was married or had exercised the power, some of the parties entitled in remainder filed a bill to have the accounts of the testator's estate taken, and the residue ascertained and secured. Before decree, A. married and had a child; and, four days after the child was born, A. exercised the power by a revocable appointment in favour of his present and after-born children. A decree for the usual accounts and enquiries had been made, under which the Master reported in favour of the appointment. The Court held that, under existing circumstances, the appointment was good, and, therefore, the proceedings in the cause ought to be suspended.

RANDLE JACKSON, Esq., by his will dated the 11th of June, 1836, after giving, amongst other things, 10,000*l.*, 16,000*l.*, and 30,000*l.* to Henry Johnson, Robert Johnson, and his nephew, Edward James Jackson and James Patrick Johnson, in trust for his nieces Caroline Butcher, Eliza Macdougall, and Ellen Catherine Jackson, for their lives respectively, and after their deaths for their children, gave the residue of his personal estate to the same trustees in trust for his nephew, Edward James Jackson, for life, and, after his decease, in trust for * * all or any one or more of the children, grandchildren or other issue of E. J. Jackson (such grandchildren and issue respectively to be born before any such appointment as thereafter mentioned should be made to them respectively), [in such manner, and, if more than one, in such shares, and with such limitations over in favour of any one or more of the other or others of the said children, grandchildren and issue respectively, and to vest and be paid, at such time, and upon such contingencies, and under such conditions and restrictions, as E. J. Jackson, at any time, by any deed to be sealed and delivered by him in the presence of two or more witnesses, and to be attested by the same witnesses, with or without power of revocation and new appointment, or by will or codicil, should appoint; and, for want of such appointment, in trust for the child or children of E. J. Jackson, in equal shares as tenants in common, when and as they respectively should attain the age of twenty-one years or die under that age leaving issue living at his, her or their death or respective deaths. Provided

(1) *Henty v. Wrey* (1882) 21 Ch. D. 333, 354, 53 L. J. Ch. 674, 47 L. T. 231.

(2) In the progress of these suits the plaintiffs in *Butcher v. Jackson*, assumed the name of Pemberton.

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that no child taking any part or share of the trust funds under any appointment to be made by E. J. Jackson in pursuance of the power thereinbefore contained, should be entitled to any further share, without bringing his, her or their share or shares into hotchpot and accounting for the same accordingly: And the testator declared that, in case there should not be any child of his nephew, E. J. Jackson, who should live to attain the age of twenty-one years or die under that age leaving issue living at his or her death, then the trust funds] should be divided among Eliza Macdougall, Ellen Catherine Jackson and Caroline Butcher, the share of Eliza Macdougall to be held upon the trusts thereinbefore declared concerning her legacy of 16,000*l.*, and the share of Ellen Catherine Jackson to be held upon the trusts thereinbefore declared concerning her legacy of 30,000*l.*, and the share of Caroline Butcher to be held upon the trusts declared respecting her legacy of 10,000*l.*; and the testator appointed the trustees, the executors of his will.

The testator died on the 15th March, 1837.

In June, 1837, the bill in the original cause of *Butcher v. Jackson*, was filed by the children of the testator's niece Catherine Butcher, who was the only one of his nieces who had issue, against the trustees and executors of his will, and his other nieces, praying [the usual accounts of the testator's personal estate].

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In July, 1838, Edward James Jackson, who, up to that time, had been a bachelor, married; and, on the 2nd of *June, 1839, he had a son born who was christened Randle.

Four days afterwards he executed a deed-poll, [whereby, in exercise of the power for that purpose given to him by the will, he appointed that, after his decease, the trustees should hold the residuary personal estate of the testator in trust for all or any one or more of the children, grandchildren or other issue of him, Edward James Jackson (such grandchildren and issue respectively to be born before any such appointment as thereafter mentioned should be made to them respectively), in such manner, and, if more than one, in such shares and with such limitations over in favour of any one or more of the other or others of the said children, grandchildren and issue respectively; and to vest and be paid at such time upon such contingencies and under such conditions and restrictions as Edward James Jackson, at any time by any deed to be sealed and delivered by him in the presence of two or more credible witnesses and to be attested by the same

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witnesses, with or without power of revocation and new appointment, or by will or codicil, should appoint, and, for want of such appointment, in trust for his said son then born, and all and every his children, by his present or any after-taken wife, to be born in his lifetime or in due time after his decease, as joint tenants:] and it was thereby provided that, when any son of Edward James Jackson should attain the age of twenty-one years, and when any daughter of E. J. Jackson should attain twenty-one or intermarry with any person whilst under that age and with the consent in writing of Edward J. Jackson if living, or, if dead, of her respective guardians or guardian, then the share to which the son so attaining twenty-one and the daughter so attaining that age or marrying with such consent as aforesaid, should be respectively entitled in joint tenancy as aforesaid, as also any other share of the personal estate thereby appointed which should devolve on or come or accrue to him or her respectively by survivorship on the death or respective deaths of any other child or children of E. J. Jackson, should be in trust for the son so attaining twenty-one and daughter so attaining that age or marrying with such consent in writing, as tenants in common with the other party or parties entitled to such personal estate, [and should devolve accordingly: and further, that the trustees should, after the decease of E. J. Jackson and during the minority of any of his children, pay and apply the income of the share of any such infant child of and in the said personal estate thereby appointed, for the maintenance and education of such child, and should accumulate the surplus thereof (if any) during such respective minority, in trust for the child from whose surplus income such accumulation should have proceeded: and further, that it should be lawful for the trustees, at any time after the decease of E. J. Jackson and during the minority of any child of him, E. J. Jackson, to raise and apply any part (not exceeding one-half) of the share of any such child of and in the said residuary personal estate thereby appointed, for the advancement in life of any such child: and the deed contained a power of revocation and new appointment in the usual form].

In September, 1839, Edward James Jackson and his co-trustees and co-executors, filed the bill in *Jackson v. Butcher*, against all the other parties to the original suit, stating, by way of supplement, the marriage of E. J. Jackson, the birth of his son and the deed of appointment, and that, by the birth of his son and the execution of that deed, the interest of the plaintiffs in the original suit, in

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BUTCHER
F.
JACKSON.

[*452]

the residuary trust monies, stocks, funds and securities bequeathed by the testator, had been wholly determined and put an end to, and that they were no longer entitled to have the trusts of the will performed, or to have the accounts taken of the testator's personal estate, and of the receipts and payments of Edward James Jackson and his co-trustees and co-executors, as prayed by the *original bill; and praying that, in the decree to be made in the original suit, regard might be had to the birth of E. J. Jackson's child, to the deed of appointment, and to the other matters stated by way of supplement; and that all such directions might be given and declarations made as might be rendered necessary by the birth of the child and the execution of the deed.

In 1841 (at which time Edward James Jackson had another child born who was christened Eliza Margaret), the plaintiffs in the original suit filed a supplemental bill for the purpose of bringing his two children before the Court.

In January, 1842, a decree or decretal order was made in the three causes, by which the Master was directed to inquire and state whether the plaintiffs in the original suit were the only children of Mr. and Mrs. Butcher, and whether there were any children of Edward James Jackson and his wife, and whether E. J. Jackson had made any and what appointment in pursuance of the power given to him, by the testator's will, in respect of the testator's residuary personal estate.

In July, 1842, Edward James Jackson had another child born, who was christened George Henry.

In March, 1843, the Master reported that the plaintiffs in the original suit were the only children of Mr. and Mrs. Butcher; that Edward James Jackson had the three children before-mentioned, and that he had executed the appointment of June, 1839, in pursuance of the power mentioned in the decree.

[*453]

To this report the plaintiffs in the original suit (as well as their father and mother) excepted, insisting *that the Master ought to have reported that Edward James Jackson had not executed any appointment in pursuance of the power.

Mr. Bethell, Mr. Hodgson and Mr. Hallett, in support of the exception, said that [the appointment was made] when the testator had only one child born, and that child was only four days old; and the chances were greatly in favour of a child of that tender age not living a year: that transmissible interests were given to the

children, and they were to be joint-tenants until they attained twenty-one; and, therefore, if they died under that age, their father would take the whole of the property, as their next of kin; or, if any one of them were to die, he might revoke the appointment as to all the rest, and, in that way also, entitle himself to the whole of the property: *Edgeworth v. Edgeworth* (1); *Tankerville v. Coke* (2); *Lord Hinchinbroke v. Seymour* (3); *Chadwick v. Doleman* (4); *Cunynghame v. Thurlow* (5); *Ward v. Hartpole* (6); that the appointment was questionable at the least, and, therefore, the Court, if it thought that the question could not be now determined, ought to direct the accounts, prayed by the bill in the original suit, to be taken, and ought to secure the property until the proper time for determining *the question should arrive. * * *

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JACKSON,

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Mr. Temple and *Mr. Dean* appeared to support the exception; but as *Mr. and Mrs. Macdougall*, the parties for whom they appeared, had not excepted to the report, the VICE-CHANCELLOR refused to hear them.

Mr. Stuart and *Mr. Bagshawe* appeared for *Edward James Jackson* and the other plaintiffs in *Jackson v. Butcher*: but

THE VICE-CHANCELLOR, without hearing them, said:

The exception insists, in effect, that the Master ought to have considered the appointment as a nullity; and, therefore, if the appointment is good in any respect, the exception must be overruled.

It seems to me that the observation made, by Lord ELDON, in *Macqueen v. Farquhar* (7) is applicable to the present case. His Lordship there says: "It is said that, if there is any ground for suspicion that the execution of the power was for the benefit of the party executing, the Court must act upon it as a judicial suspicion. I am extremely apprehensive I should make great havoc in many considerable titles by adopting that principle." It was said, in support of the exception, that, as the appointor might, possibly, derive some benefit from the appointment, therefore, it was void *ab initio*. I cannot, however, accede to that proposition: for the father *might have died on the day after he had made the appointment, and then the child that he had at that time, would have

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(1) 1 Beatt. 328.

(2) Mose. 146.

(3) 1 Br. C. C. 395.

(4) 2 Vern. 528.

5) 32 B. R. 242 (1 Russ. & My.

436, n.).

(6) 22 B. R. 61 (3 Bligh, 470).

(7) 8 B. R. 212; see p. 222 (11 Ves. 467; see 479).

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taken the whole of the property. There are now three children ; and it is very probable that more will be born ; but, however that may be, the appointment is a reasonable one ; for it is made to all the children equally ; and equality is equity. It is true that the father might, on the happening of some future event, take some benefit from the appointment unless the Court should interfere to prevent him : but, as that contingency has not yet happened, I think that the Court can not now interfere ; and I must say that the appointment is good.

Exception overruled.

1845.
March 8.

SHADWELL,
V.-C.
[456]

BARNACLE v. NIGHTINGALE (1).

(14 Simons, 456—462 ; S. C. 9 Jur. 221.)

A testator devised lands to his son A. T. for life, and, after the decease of A. T., to his first son lawfully issuing, and, for default of such first issue, to the use of the second, third, and every other son, and the heirs of his or their bodies, the elder to be always preferred before the younger of such sons and the heirs of his body ; and, for default of such issue, then to the use of all and every the daughters of A. T. and the heirs of the body of such daughter and daughters ; with remainders over.

Held that the first son of A. T. took, neither by construction nor by implication, an estate-tail, but a life-estate only.

JOHN TAYLOR, being seised in the fee of two freehold closes and possessed of a house for the remainder of a term of one thousand years, made his will dated the 27th of January, 1794, and, partly, in the following words :

[*457] “ I give, devise and bequeath all that my two closes or enclosed grounds lying and being in the parish of *Mickleton in the county of Gloucester, the upper close commonly called or known by the name of Phipps Hole, the lower close commonly called or known by the name of Hunks Walk, with my house I now live and dwell in and all appurtenances belonging, to my son Albright Taylor for and during the term of his natural life, so that he paying all my just debts and funeral expenses and legacies hereinafter mentioned with and out of the real and personal estate, which I do hereby charge with the payment thereof ; and, from and after the decease of my son Albright Taylor, then to the first son of my said son Albright Taylor lawfully issuing, and, for default of such first issue, then to the use and behoof of the second, third, fourth, fifth, and all and every other son and sons and the heirs of his or their bodies

(1) This case would scarcely have been thought to require a report if the Court of King's Bench had not subsequently adopted a different construction of the same will ; see *Harris v. Taylor*, 10 Q. B. 718.—O. A. S.

lawfully issuing, the elder to be always preferred and to take before the younger of such sons and the heirs of his body; and, for default of such issue, then to the use and behoof of all and every daughter of the body of my son Albright Taylor and the heirs of the body of such daughter and daughters; and, for default of such issue, then I give, devise and bequeath it to my son John Taylor during the term of his natural life, and, after his decease, to his first son lawfully issuing, and, for default of such issue, then to the use and behoof of the second, third, fourth, fifth and every other son and sons and the heirs of his or their bodies lawfully issuing, the elder always to be preferred and to take before the younger of such sons and the heirs of his body; and, for default of such issue, then to the use and behoof of all and every daughter of the body of my son John Taylor and the heirs of the body of such daughter and daughters; and, for default of such issue, then to remain to the right male heir for ever."

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NIGHTINGALE.

The testator died in 1798, leaving his sons Albright and John his only children him surviving. John died in 1801, without having been married. Albright died in 1809 leaving John Taylor his eldest son and heir-at-law: and the bill alleged that the last named John Taylor, under his grandfather's will, became, at his father's decease, tenant in tail in possession of the two freehold closes; and that, in 1822, he suffered a recovery of them, and, thereby, became seised in fee; and, by his will dated in October, 1840, devised them to the plaintiffs in trust to sell; and that in May, 1842, the plaintiffs agreed to sell them to the defendant; but that he refused to perform the agreement, on the ground that the plaintiffs could not make a good title. The bill prayed for a specific performance of the agreement.

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The Master having been directed to inquire and state whether a good title could be made to the closes, * * reported in favour of the title: whereupon the defendant excepted to his report, insisting that, under the grandfather's will, John Taylor took no greater estate in the closes than an estate for his life.

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Mr. Bethell and *Mr. Rudall*, in support of the exception, [submitted that John Taylor, the grandson, did not take, either by construction or by implication, any greater estate in the property agreed to be sold, than a life-estate, and, consequently, that the plaintiffs, who claimed under him, could not make a title to the property].

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NIGHTIN-
GALE.
[461]

Mr. Bagshawe and *Mr. W. T. S. Daniel*, in support of the report, contended that, John Taylor, the son, took an estate-tail, in the property, by construction, and, if not, by implication. They founded their arguments on the grounds stated in the answer to the objection before the Master.

THE VICE-CHANCELLOR:

[*462] The devise on which the question in this case has arisen, is: "To the first son of my son, Albright Taylor, lawfully issuing, and, for default of such first issue, then *to the use and behoof of the second, third, fourth, fifth and all and every other son and sons, and the heirs of his or their bodies lawfully issuing; the elder to be always preferred and to take before the younger of such sons and the heirs of his body." Now it seems to me that the words, "the elder," must, of necessity, be taken to mean the elder of those sons who are mentioned in that member of the sentence which commences with the word, "then." It is very probable that the words of limitation have been unintentionally omitted, after the gift to the first son; but, nevertheless, I can not supply them: I must construe the will as I find it.

The words: "for default of such issue," which precede the devise to the daughters of Albright, mean: "For default of the issue before mentioned," that is, the first son of Albright, and his second, third and other younger sons, and the heirs of the bodies of such second and other younger sons.

Exception allowed.

The VICE-CHANCELLOR offered to send a case for the opinion of a court of law upon the question: but the plaintiffs' counsel declined the offer. [And see the note at the beginning of this report.]

1845.
April 22, 24.

KIDD v. NORTH.

(14 Simons, 463—474.)

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[THIS case was affirmed on appeal, as reported in 2 Ph. 91; 16 L. J. Ch. 116; 10 Jur. 995, to be contained in a later volume of the Revised Reports.]

SLOMAN v. BANK OF ENGLAND (1).

(14 Simons, 475—492; S. C. 14 L. J. Ch. 226; 9 Jur. 243.)

One of two trustees of a sum of stock, sold it out under a power of attorney, to which he had forged the signature of his co-trustee, and, some time afterwards, absconded.

Held that the Bank of England was compellable, in a court of equity, to re-invest the stock in the name of the other trustee.

In October, 1827, the sum of 6,250*l.* Four per Cent. stock, which was afterwards converted, by 11 Geo. IV. & 1 Will. IV. c. 18, into 3*l.* 10*s.* per Cent. was transferred into the names of the plaintiff Robert Hillman, of Lyme Regis, solicitor, and the defendant Christopher Picard, of London, linen-draper, upon certain trusts for the benefit of the plaintiffs, John Sloman, of Wick, in Hampshire, and Louisa his wife. Mrs. Sloman was Mr. Hillman's sister, and Mrs. Picard was Mr. Sloman's sister.

Picard received the dividends of the stock and remitted them, from time to time, to Sloman, down to the 5th of January, 1841.

On the 22nd of February, 1841, Sloman, who had become suspicious that Picard's affairs were going wrong, in consequence of a cheque for 300*l.*, which Picard had sent him, having been dishonoured, went to London and called on Picard; but, on being told that Picard was confined to his bed and too ill to see any one, he left the house. He then went to Mr. Taylor, Picard's stock-broker, who informed him, in answer to an inquiry which he made respecting the stock, that, by Picard's direction, part of it had been sold out in June and the remainder in July, 1839, under a power of attorney. Sloman appearing to be surprised at this information, Taylor asked him if there was anything wrong in the *transaction; to which he replied that he did not understand it, and would write to Hillman on the subject. He wrote to Hillman accordingly; and then returned to his house in Hampshire; where he told his unmarried sister (who, afterwards, went to London with him, to visit Mr. and Mrs. Picard), that, as he had stated to Hillman, he was apprehensive that Picard had committed a forgery on the Bank.

On the 25th of February he returned to London accompanied by his sister and Hillman. The latter went, with Miss Sloman, to Picard's house; but, on being told that Picard was too ill to see any one, he went away. Shortly afterwards, he and Sloman called

1845.

March 8, 10,
11, 12.SHADWELL,
V.-C.

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(1) *Burton v. London and North-Western Railway Co.* (1888) 38 Ch. D. 144, 152, 57 L. J. Ch. 676, 59 L. T. 122; *Barton v. North Staffordshire Railway* (1888) 38 Ch. D. 458, 465, 57 L. J. Ch. 800, 58 L. T. 549.

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 ENGLAND.

on H. Andrews, who was an intimate friend of Picard's, and Hillman then said that he must employ a solicitor, immediately, for the purpose of proceeding respecting the stock. He and Sloman next went to Taylor, who communicated to them all the particulars relating to the sale of the stock; and, on Sloman betraying considerable anxiety, Taylor again asked whether there was anything amiss in the transaction; to which Hillman replied that there was; but that he wished Taylor not to say anything about it at present; as he would go, with Taylor, at ten o'clock on the following morning, at which time the Bank (which was then closed) would be open, and inquire whether any portion of the stock had been replaced.

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Andrews, after his interview with Sloman and Hillman, went to Picard's house, and told him that a warrant for his apprehension for forgery, either was or would be, shortly, out against him, and advised him to leave home: which he did, and went to Andrews's house; where he stayed that night, and went away early on the 26th of February. In the evening of the *25th, Sloman called upon Andrews, and Andrews then told him that Picard was in the house; but he went away without seeing Picard. On the following morning, Andrews told Sloman that Picard had left his house very early. At ten o'clock in the same morning, Taylor and Hillman went, together, to the Bank; and ascertained that the stock had been sold out and no part of it replaced. Whereupon Hillman said, to Taylor, that he had not authorized the sale of the stock, nor executed any power for the sale of it. Taylor then urged him to make those facts known to the Bank: to which Hillman replied that he would call again, on Taylor, in the course of the day, for that purpose; but that he would, first, consult his town agents, Messrs. Tooke, on the business. Messrs. Tooke advised Hillman to give the Bank notice to replace the stock, and undertook to prepare the notice. Afterwards, Sloman and Hillman called again upon Taylor; but finding him engaged, they went away, saying they would call again; they did not, however, return.

Early on the 27th of February, Picard left England, in a Hamburg steam-boat.

About eleven o'clock on that day, Taylor, in consequence of Hillman not having returned on the preceding day, informed the Governor of the Bank, for the sake of his own character, that Picard had sold out the stock under a forged power of attorney. In the afternoon, Hillman, who had then obtained the notice from

Messrs. Tooke, went to the Bank with Taylor, and delivered it to the Chief Accountant; and, after inspecting the power of attorney, they, by the Governor's desire, went, to the Mansion House, with the Bank solicitor, and made depositions, upon which a warrant *was issued for apprehending Picard. The officer to whom the warrant was delivered, was unable to find Picard; and, consequently, it was never executed.

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The Bank having refused to replace the stock, because: "under all the circumstances of the case, and, particularly, considering the conduct of the parties in reference to Picard's escape, they did not consider themselves liable to do so," and the plaintiffs having been advised that, as the stock was standing in the joint names of Hillman and Picard, the former, alone, could not bring any action at law against the Bank, and that the only remedy was a suit in equity, the bill was filed, [praying that the Bank might be decreed either to replace the stock or to pay, to Hillman, the value of it, and also the amount of the dividends from the 5th of January, 1841; and that a new trustee might be appointed in Picard's place.

The Governor and Company, in their answer, stated their belief that Sloman and Hillman delayed giving them information of the particulars of the case, in order to enable Picard to withdraw: and] submitted that, if that fact should appear, it would operate to release them from their liability (if any) to replace the stock and to pay the dividends. They admitted that they had received, from the Government, monies for the payment of all the dividends accrued on the 6,250*l.* stock; and they said that they had paid all such monies to the several persons in whose names that sum had stood, from time to time, in their books.

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Sloman and Hillman, in their answer to a cross-bill of discovery filed against them by the Bank, denied that they were privy to Picard's escape, and said that, until the 28th of February, 1841, they did not know that he had left or was capable of leaving his house; and Sloman *added that the information received, by him, on the evening of the 25th of February, that Picard was then in Andrews's house, made no impression upon him, and that he did not communicate it to Hillman.

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Mr. Bethell, Mr. Koe, and Mr. Follett, for the plaintiffs, said, that there was nothing in the evidence on behalf of the Bank, which justified a suspicion that the plaintiffs connived at or were even privy to Picard's escape; and that, if those facts had been

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established, the Bank would still have been liable to the demand made by the bill. [They cited *Davis v. The Bank of England* (1), *Stone v. Marsh* (2), and other cases.]

Mr. James Parker and *Mr. Roundell Palmer*, for the Governor and Company of the Bank :

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Sloman and Hillman abstained, for nearly a week, from giving notice of the forgery to the Bank, in order to enable Picard, who was Sloman's brother-in-law, to escape : and, that being so, they have forfeited their right to have the stock replaced. * * For, if Picard had been prosecuted and convicted, the Bank, if compelled to make good the loss, would have had a right to prove (either directly or in the names of the plaintiffs) the amount of the proceeds of the stock, against his estate ; but the plaintiffs, by enabling him to escape, have rendered his conviction impracticable, and, therefore, have, in effect, deprived the Bank of that right.

Mr. Bethell replied.

THE VICE-CHANCELLOR :

In this case, which I have heard at very great length, I have not the slightest doubt with respect to the situation in which the Bank stands.

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The liability of the Bank is constituted by the Act of the 11 Geo. IV. & 1 Will. IV. c. 13 (3), by which the Four per Cents. were converted into Three and a half per Cents. First of all, certain enactments were made, which had the effect of giving an option to the different *proprietors of the Four Cents., either to accept the same amount of stock in the Three and a half per Cents., or to be paid off. The Act then provided that the dividends of the newly created stock, should be payable at the Bank of England, and that the sums for the payment of them, should be issued and paid out of the Consolidated Fund. I notice that with reference only to that singular ground on which the Court of King's Bench rested their judgment in the case of *Davis v. The Bank of England*, when it was heard in error ; namely, that, inasmuch as the declaration did not allege that the requisite funds for payment of the dividends had been supplied to the Bank by the Government, there was no liability on the part of the Bank. Now it seems to me that every Court of Law ought to take it for granted that that which the

(1) 27 R. R. 667 (2 Bing. 393 ; and
5 B. & C. 185).

(2) 30 R. R. 420 (6 B. & C. 551).
(3) Rep. S. L. R. Act, 1870.

Legislature says shall be done, has been done: but, however, the Court of Error was satisfied to get rid of any difficulty in that case, by making that objection.

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The 10th section of the Act provides that books shall be kept, by the Bank, in which the names of the proprietors of the new stock shall appear. Then the 13th section, as I understand it, has made it the duty of the Governor and Company of the Bank of England to keep an account, in books to be provided for that purpose, which shall show every transfer and assignment which is made by parties appearing to be interested in the stock in question. They are made, if I may use the expression, the Parliamentary book-keepers of this fund; and it is a duty which they owe to all the persons who may be interested in the fund, so to keep the account as that it may distinctly appear, at all times, what transfers and assignments have been made. And my opinion is that if, at any time, there had been stock *standing in the name of A., and, afterwards, that stock did not appear (no matter from what cause) to be standing in his name, A. would, *primâ facie*, have a right to say: "Let the account stand as it did on a given day." If it can be shown that A. himself has transferred the stock, that is an answer; but the Bank account ought to be kept, with regard to every individual who ever appeared as a stock proprietor, in such a manner as to show what the account really is.

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If that be so, it follows, as a matter of course, that relief may be had in equity; because the plaintiff in equity has to allege against the Bank: "you are bound, by law, to be my book-keeper in respect of my stock, and to show me the true account of it; and if I can show that, upon a given day, stock stood in my name, and now show that it does not stand in my name, and I have not authorized the transfer of it, you are responsible to me,—that is to say, you must make the account stand as it ought to have stood."

This appears to me to be the true view of the case; and, according to that view, there would be a direct right in every person who was interested in the stock in question, to file a bill, against the Bank of England, to have any error occasioned by the Bank corrected. It is observable that an action gives a remedy circuitously only; because all that can be recovered by an action is a certain sum of money, which may or may not be sufficient to buy a fund to replace the stock; and it seems to me that the true view of the case is that which I have taken, and which is formed from the provisions of the Act of Parliament.

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And I further think that the view which I have taken is a complete answer to the argument that, where the *account stands in the names of two, they are joint tenants, and each of them may transfer a moiety of the fund. The unsoundness of that argument is apparent from this, that, if it be the right of the joint tenant to transfer a moiety of the fund, he may (supposing the amount of it to be 1,000*l.*) first transfer 500*l.* Then 500*l.* will remain in the names of himself and his co-tenant; and he may transfer a moiety of that 500*l.*; and so he may go on, transferring moiety after moiety, until the remainder will be less than any assignable quantity. Virtually he will have the power to transfer the whole; and that will be the result of the doctrine that a joint tenant of a fund has a right to transfer a moiety of it. In my opinion, however, it is apparent, from the plain language of the Act of Parliament, that the transfers were to be made by the parties in whose names the stock, which was to be made the subject of transfer, stood.

In this particular case, the very view of the law which I take, was adopted by the Bank of England; for no transfer was made except on the production of that which was, apparently, an authority of the two joint tenants; but it turned out not to be the authority of the two; and my opinion upon the statute is that, therefore, it was a nullity: and the Bank having authorized a transfer which they ought not to have sanctioned, are themselves now liable, in a court of equity, to restore, to the parties complainant, the stock as it stood immediately before the transfer. I mention that, because the pleadings are rather singular in their form; and it seemed to me that there was some sort of difficulty as to how the relief should be given; but my opinion is that, if the stock is decreed to be replaced, the parties have only to ask for the dividends from the time when they were last received, and then there will be an end of the matter.

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The next question is: whether there has been a sufficient defence made, on the part of the Bank? With respect to that, my opinion is that the Bank act meritoriously, in a case where they have any ground whatever to suspect that there has been any unfair proceeding, if they so manage the matter as to produce a fair investigation of the case. I do not, however, think that it could amount to much by way of defence; because, if the stock had been improperly transferred by the act of the Bank itself, I should like to know what subsequent misconduct of the plaintiff could deprive him

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of his antecedent civil right. It has been urged, by way of defence in this case, that the plaintiffs have lost their right by some supposed subsequent misconduct; whereas their right to have the stock replaced did exist at the very moment when the stock was parted with improperly. How their subsequent misconduct, some two or three years afterwards, when it became a question how far they had or had not fully discovered the improper act which had been practised against them—how far that can affect their civil right, is to me a mystery. But still I think that, in a suspicious case, the Bank acts meritoriously by the public in having the circumstances investigated; and a regard to fair dealing requires that, as soon as the criminal conduct is discovered, notice of it should be given to the Bank.

But, in this particular case, I do not think that there has been any improper conduct on the part either of Mr. Sloman or of Mr. Hillman. Mrs. Sloman appears to have had nothing whatever to do with it. Mr. Sloman came back with Mr. Hillman to London, on the morning of the 25th of February, 1841. He wished to see Mr. Taylor, the stockbroker; and it appears that, on account of Mr. Taylor being employed as a juryman on a trial at Guildhall, he could not be seen until after the Bank was shut. Then there is an interview. It had been suggested (1) that, possibly, the stock might have been replaced; and I think that it was a sort of moral duty on Hillman and Sloman, to ascertain whether that fact really were so; because, if the stock had been replaced, every proper feeling dictated that they ought not to divulge the crime which had been committed, when the person who had committed it, had made all reparation which was in his power. Then it appears that, about ten o'clock on the next morning, Mr. Taylor, a person who had been employed, throughout, in the transaction, and who, to a certain extent, was a servant of the Bank, or, at any rate, an agent accredited by the Bank, searched the books of the Bank, and ascertained that the stock had not been restored. What is then done? Mr. Hillman said he should go and consult his London agent. He was a professional man; and he was the person upon whom, in the eye of the law, the forgery had been committed. He went to Mr. Tooke, and made a representation of the case. What exactly passed between him and Mr. Tooke, does not clearly appear; but it seems that Mr. Tooke advised that a certain notice *or letter should be drawn in his office, and be delivered to the

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(1) Hillman made this suggestion.

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Bank on the next day. Now it is very remarkable that, when the next day came, Mr. Taylor, who stood in the situation of the stockbroker in the transaction, who could not fail to know what the facts were, does not think it necessary to go at ten o'clock (although, on the day before, he had gone at that hour, in order to see whether the stock was re-invested); but, according to his own account, he went at eleven o'clock. I mention that only because, if hours are to be made of so much importance, of how little importance did Mr. Taylor think the hour was. Then, in the afternoon of the same day, the letter was taken to the Bank, and information of the forgery was given. Were these gentlemen to run, in a frantic manner, to the Bank, with a story which, perhaps, would have been unintelligible? Were they not to act in a manner which would, at once, give full and clear information to the Bank? How they could well have done otherwise than as they did, I do not see. Then it is observable that there is not a particle of evidence to show that either of them had any communication with Picard, so that it can be said that either of them was privy to or assisting in his escape. The whole of that seems to have been done by Mr. Andrews, who was the person who, in the language of the law with respect to an accessory after the fact, received, relieved, assisted and comforted the felon. All the steps that Hillman and Sloman took, were directed to the object of ascertaining, fully, what the facts were with respect to the forgery which was suspected to have been committed, and with respect to any restitution which might have been made of the property.

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It seems to me that, in a case like this, where misprision of felony is alleged, there ought to be some strong *and striking ground to support the allegation, and that the Court ought not to be occupied, hour after hour, in sifting minute circumstances, which, after all, when the mosaic work has been put together in the most ingenious manner, and has received the finest polish which argument can give it, amount to no more than that there may be some ground for suspicion. But, with respect to the present case, I must say that, throughout the whole of the argument, my mind did not receive the slightest impression that there was any fair ground of suspicion as to the conduct of Mr. Hillman and Mr. Sloman. Therefore the defence totally fails: and, as the equity is clear, there must be a decree that the Bank do, forthwith, replace the sum of 6,250*l.*, Three and a half per Cents., in the name of Hillman, and also pay to him the amount of the dividends from the

5th of January, 1841. Upon the mere restitution of the stock, a right would accrue, to Mr. Hillman, to receive the dividends from the time when the stock was abstracted; but I collect, from the case, that the intermediate dividends were paid by Mr. Picard; for, otherwise, the fraud would have been discovered long before; and, therefore, all the relief that can be granted is the restoration of the stock, and the payment of the dividends which would have been received, on the fund, subsequent to the 5th January, 1841.

The costs of the suit and of the cross-bill must be paid by the Bank.

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COOKE v. TURNER.

(14 Simons, 493—504.)

1845.
Nov. 26.

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[THIS was a report of the proceeding at law in which the validity of the forfeiture clause referred to in the note *ante*, p. 565, was established. The proceeding is also reported in 15 M. & W. 727.]

MILLER v. HARRIS.

(14 Simons, 540—541; S. C. 9 Jur. 388.)

1845.
April 18.

SHADWELL,
V.-C.

[540]

A testator directed the trustees of his will to procure a suitable house for the residence of his children (who were infants), and to engage a proper person for the purpose of taking the management and care of the house and of his children, during their minorities; and he requested his late wife's sister, if she should be alive at his decease, to take such management and care on herself.

Held that the testator had appointed his wife's sister to be the guardian of his children.

THE testator in the cause devised his real and residuary personal estate to trustees, in trust for his children (all of whom were infants) on their attaining twenty-one; and he directed the trustees to procure and rent a suitable house for the residence of his children, and also to engage a proper person for the purpose of taking the management and care of the house and of his children during their minorities, and to apply a competent part of the income of the trust property in paying the rent of the house and providing for the maintenance and education of his children during their minorities; and he requested Miss May, the sister of his late wife, if she should be alive at his decease, to take upon herself the management and care of the house and of his children.

After the testator's death, Miss May was applied to by the

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trustees, and consented to take upon herself the management and care of the children, and of a house which the trustees had taken for them.

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On the hearing of a petition presented, by the children, for the appointment of a guardian and for maintenance,

The VICE-CHANCELLOR said that the testator had sufficiently expressed his intention that Miss May should be the guardian of his children, and directed a reference as to their maintenance only.

Mr. Stuart, Mr. Teed, Mr. Willcock, and Mr. Follett, appeared for the different parties.

HODSON v. BALL.

(14 Simons, 558—574 ; S. C. 9 Jur. 407.)

1845.

May 3.

SHADWELL,
V.-C.

[558]

A gift to a testator's children, with a substitutionary gift in case any child should die in the testator's lifetime leaving issue to the issue, and an executory gift over in case any of the children and their issue should die in the lifetime of any husband or wife with whom the testator's children should have married.

The executory gift over is too remote.

JOHN HODSON, by his will dated the 4th of December, 1811, [after directing payment of his debts, funeral expenses and the charges of proving his will, devised and bequeathed all his real and personal estate to trustees, their heirs, executors, administrators and assigns, upon trust to collect, receive and invest his personal estate, and out of the income thereof, and the rents, issues and profits of his real and personal estate, to pay an annuity to his wife during her widowhood, and to pay, divide and distribute the residue of the income, rents, interest and profits of his real and personal estate equally between all his children, share and share alike, the share of each daughter to be paid to her separate receipt, and the income, rents and profits to be divided amongst them half yearly ; and in case any of his said children should die in his lifetime without leaving lawful issue, then he gave the share or shares of such child or children, to the survivors of them equally ; and, in case there should be only one surviving child, then he gave the whole of such share or shares to such survivor ; and, if any of his said children should die in his lifetime leaving lawful issue, then he gave the share or shares of such deceased child or children, to his, her or their lawful issue respectively, such issue taking, only, such share or shares as his, her or their parent or parents would,

if living, have been entitled to, share and share alike; and, in case any of his said children should marry and have issue, and any such child or children and his, her or their issue should all die in the lifetime of any husband or wife with whom any of his said children should have so intermarried, then he gave the share and shares of his said children respectively, unto such other of his said children as should be then surviving, and to the respective issue of such of them as should be then dead (to take *per capita* and not *per stirpes*) share and share alike, it being his will and mind and full determination that none of his sons' wives or daughters' husbands should become heirs to their children's property].

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The testator died in October, 1815, leaving his wife, and James Hodson, his eldest son and heir, and four other children him surviving. Two of those named in his will died in his lifetime, without having been married, and he had one child born after the date of his will.

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In 1816 the eldest son became bankrupt. He and his brother, William, who was the plaintiff in the cause, had several children, some of whom were born in the testator's lifetime. In 1832 the testator's widow died.

[One] question was whether, under the will, the testator's children living at his death, took estates in fee in their shares of his real estate, and absolute interests in their shares of his personal estate, or whether they took life-estates only, with remainders, by implication, to their respective children, absolutely.

[The VICE-CHANCELLOR held upon the construction of the whole will, that the surviving children took estates in fee in their shares of the real estate and absolute interests in the personal estate; and it is thought unnecessary to retain here so much of the report as deals with the question of construction.]

Mr. Bethell:

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Another question remains to be disposed of, namely, whether the gift over in the following clause, is not too remote: "And in case any of my said children shall marry and have issue, and any such child or children and his, her or their issue, shall all die in the lifetime of any husband or wife with whom any of my said children shall have so intermarried, then I give the share and shares of my said children respectively, unto such other of my said children as shall be then surviving, and to the respective issue of such of them as shall be then dead." The gift over is not confined to a life in

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being at the testator's death and twenty-one years after ; for any one of his children might have married a person who was not born until after his death.

The VICE-CHANCELLOR held the gift over to be too remote, for the reason stated by *Mr. Bethell*.

1845.
May 3, 5.

SHADWELL,
V.-C.
[575]

GARDNER v. MARSHALL (1).

(14 Simons, 575—588 ; S. C. 9 Jur. 958.)

Under the old law of husband and wife the bankruptcy of the husband (who had already received considerable sums in respect of his wife's personal estate) was sufficient ground for enforcing the wife's equity to a settlement as against the whole of any life-interest subsequently accruing to the wife, where she had no other adequate provision secured to her.

THE bill was filed by Sarah, the wife of John Gardner the elder, a bankrupt, against her husband and his assignees, her children and other persons, stating that William Haydon, the plaintiff's late uncle, by his will dated the 22nd of December, 1822, gave all his personal estate and effects to the plaintiff for her life, and, after her decease, to all her children who should be living at her decease, absolutely ; and praying, amongst other things, that it might be declared that the plaintiff was entitled to have a proper settlement made, for her benefit, of her life-interest in the residuary personal estate of the testator, William Haydon, and of the trust-funds forming part thereof ; and that it might be also declared that the sum of 894*l.* 10*s.* 6*d.* produced by the sale of the plant and fixtures in and about the brewery in the bill mentioned, formed part of such residuary estate : and that a proper settlement might be accordingly made, for the benefit of the plaintiff during her life, of the said residuary estate and the trust-funds produced thereby ; and that, for that purpose, an account might be taken, if necessary, of such residuary estate and trust-funds, and of the accumulations thereof ; and that the same might be properly secured for the benefit of the plaintiff and her children ; and that the interest and dividends thereof might be paid to the plaintiff, for her life, for her separate use ; and that the defendants and all other necessary parties, might be decreed to join in the execution of or otherwise in effectuating such *settlement of the plaintiff's life-interest in the residuary estate and trust-funds ; and that the assignees of her husband's estate might be restrained from commencing or

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prosecuting any action against the trustees of William Haydon's will to recover, and that the trustees might be restrained from paying to the assignees, the interest and dividends of the residuary estate, or the 894*l.* 10*s.* 6*d.*

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The cause was heard on the 23rd of May, 1843, and, by the decree then made, it was declared that the plaintiff was entitled to a settlement in respect of her fortune under the will of William Haydon; and the Master was directed to approve of a proper settlement on her, having regard to her fortune under the will of Richard Haydon (her father) or otherwise, and to the past application thereof.

On the 13th of November, 1844, the Master made his report in pursuance of the decree, and thereby found that, in February, 1805, the plaintiff married the defendant John Gardner, and that, subsequent to the marriage, Richard Haydon, the plaintiff's father, advanced John Gardner divers sums of money amounting, in the whole, to 6,000*l.*, no part of which John Gardner settled on the plaintiff, but appropriated the whole thereof to his own purposes; that the testator William Haydon made his will to the effect before stated, and died on the 7th of October, 1824; that, on the 23rd of September, 1828, the trustees of his will lent and advanced the whole of the residue of his personal estate, the interest whereof was so as aforesaid bequeathed to the plaintiff for her life, to John Gardner, who, to secure the re-payment thereof, executed, on the same day, an indenture of mortgage, whereby the brewery *which he then carried on, together with the fixtures and plant thereunto belonging and certain other hereditaments, were assured and conveyed to the trustees of the will, upon trust to secure the said residue (amounting to the sum after mentioned) and interest; but subject to a previous mortgage on the said hereditaments and premises for 12,000*l.*; that John Gardner received and disposed of, for his own purposes, the whole of the said residue of the estate of the testator William Haydon, and never repaid the same; but a part thereof, under the circumstances after mentioned, was realised on the sale of the mortgaged premises; that, in March, 1833, the three infant children of the plaintiff, by their next friend, filed their bill in this Court against John Gardner, and against the trustees of William Haydon's will, stating that the mortgage-security before mentioned, upon which the residue of William Haydon's estate had been advanced, was an improper and deficient security, the same being, in point of value, insufficient to answer the sums charged

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thereon as aforesaid; and praying that the trustees might be directed to make good the residue so as aforesaid improperly lent; and that, when the same was raised, it might be invested in proper securities on the trusts of the will; and that proper accounts might be taken of William Haydon's personal estate and effects.

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The Master further stated that that suit was prosecuted; and that, after certain proceedings had therein, an order was made, on the 12th of July, 1834, whereby it was declared that the sum of 5,339*l.* 15*s.* 2*d.* was the clear residue of William Haydon's personal estate; and it was, amongst other things, ordered that new trustees of his will should be appointed and the trust premises and securities duly assured and conveyed to them; which *order was duly prosecuted and carried into effect: that, on the 18th of September, 1837, the brewery and premises comprised in the before-mentioned mortgage security, were sold; but the proceeds arising from the sale, after satisfying the previous incumbrances, were inadequate to satisfy the debt of 5,339*l.* 15*s.* 2*d.* due from John Gardner, on the mortgage; and there remained, out of the said purchase-money, only the sum of 3,621*l.*, together also with the sum of 894*l.* 10*s.* 6*d.* (the valuation of the plant and fixtures belonging to the brewery) applicable to the reduction of the said debt, which last-mentioned sum of 894*l.* 10*s.* 6*d.* had been a subject of dispute in this suit, and to restrain the assignees of John Gardner from recovering which sum an injunction had been granted, which was ordered to be continued by the decree in this cause.

The Master further found that, by an indenture bearing date the 9th of August, 1834, being a deed made in pursuance of the order of the 12th of July, 1834, the plaintiff assigned the income of her late father's real and personal estate, to which she was entitled under his will for her life for her separate use, to the new trustees of William Haydon's will, upon certain trusts for making up any deficiency that there might be in the shares of certain of her children in the residue of William Haydon's personal estate, arising from the non-payment of the mortgage debt due from John Gardner and the inadequacy of the mortgage-security of the 23rd of September, 1828; and that, by an indenture bearing date the 1st of July, 1836, the plaintiff made a further assignment of her life-interest under her father's will, in order to secure the repayment of 800*l.* which had been lent to her husband: that the plaintiff, under her father's will bearing date the 30th of April, 1829, was entitled, *subject to a life annuity of 250*l.* to a person who died in

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MARSHALL.

March, 1843, to a life-interest in her father's real and personal estates, to her separate use; but which (by reason of the several securities before mentioned, and to become a party to which she was induced and prevailed on in order to benefit the estate and condition in life of her husband) had never been of any pecuniary advantage to her; and that, by reason of the provision to which she was entitled under her father's will to her separate use, having been, under the provisions of the indenture of the 9th of August, 1834, applied and appropriated to make good the debt due, from her husband, on the insufficient mortgage of the 23rd of September, 1828, her husband's estate was properly liable to make good such sum of money as had been so as aforesaid appropriated, out of her father's estate, to make good such debt; and that the whole of the sums which would have been payable to the plaintiff but for the charges before mentioned, had been, by reason of such charges, wholly lost to her; inasmuch as she had not received any part thereof; and that, by reason of the annual income arising from her father's personal estate being insufficient to pay the annuity so as aforesaid given and bequeathed by him, the same had been raised and paid out of the principal monies and assets of his personal estate, so that, in fact, notwithstanding the annuity had ceased by the death of the annuitant, the plaintiff would benefit but little, if at all, by the benefit intended to be conferred on her by her father; and the said several charges and securities on his estate had left the plaintiff unprovided for.

The Master further found that, on the 27th of August, 1840, a *fiat* in bankruptcy was issued against the plaintiff's husband, and, since that time, the plaintiff had *been without the means of maintenance and support; and that, previous to the bankruptcy of her husband and since her marriage with him, the plaintiff had lived in comfortable circumstances and in a respectable style in the town of Godalming, and became the mother of ten children by her husband, all of whom were still living and were defendants to the suit; and that the plaintiff, since her husband's bankruptcy, had subsisted by means of the loans of money her friends and relations had made to her, and by the voluntary assistance she had otherwise received from them.

[*5-0]

The Master next found, from the affidavits referred to in his report, that, during the whole of the interval between June, 1836, and the time of swearing such affidavits, with the exception of about twelve months partly in the year 1839 and partly in the year 1840, the plaintiff had been living separate and apart from her husband;

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v.
MARSHALL.

and that, during about fifteen months after the month of June, 1836, she received some maintenance out of the business of the brewery which was carried on by Mr. William Gardner, as trustee for her husband; but that, since, she had been maintained and supported by the voluntary assistance, pecuniary and otherwise, of her relations and friends, and her husband had not, since the month of June, 1836, except as aforesaid, contributed to her maintenance and support; and that Mary Gardner (one of her children) had been living with her and at her expense (except when paying occasional visits to her relations and friends), and that, during the twelve months or thereabouts during which the plaintiff's husband resided with her, he did so at her expense, and did not contribute towards her maintenance and support; and that others of her children besides the said Mary Gardner had, at different *periods, been separated from her husband and maintained and supported by her.

[*581]

The Master concluded his report by stating that, having regard to the large amount of property that the husband had received from the estates of his wife's relations and connexions, and to her then entirely unprovided condition, and also to her former circumstances and position in life (her husband having, prior to his bankruptcy, conducted and been proprietor of an extensive brewery which afterwards sold for upwards of 18,000*l.*) and to the fact that he obtained his certificate of conformity under the bankruptcy on the 4th of March, 1843, he, the Master, was of opinion and therefore found that the interest, dividends and annual proceeds of the residue of William Haydon's personal estate, amounting to the sum of 5,339*l.* 15*s.* 2*d.*, when the same should be raised and set apart, should be settled upon the plaintiff for her separate use, to be paid into her own proper hands, upon her own proper receipt and that of no other person, as and when the same should become payable, independent of the control of her husband, and without power to her to anticipate such interest, dividends and annual proceeds or any part thereof.

The assignees of the plaintiff's husband excepted to the report, insisting that the Master ought not to have found that the whole of such interest and dividends ought to be settled on the plaintiff.

Mr. Anderdon and *Mr. Freeling*, in support of the exception, [cited cases illustrating the general rule that the wife's equity to a settlement did not extend to the whole fund].

Mr. Bethell and *Mr. Rolt*, in support of the report, adverted to the advances made by the plaintiff's father, to her husband, and to the losses which she herself had incurred on his behalf; and added that there were two classes of cases relating to the property of married women; one, where the husband was maintaining his *wife; and the other, where he was not performing that duty: that, in the one, the Court did consider what proportion of the property ought to be settled on the wife, but, in the other, it did not enter into the consideration of that question, but had regard solely to what was sufficient for her maintenance; and that, in this case the question was not a question of settlement, but of maintenance; for it appeared, from the Master's report, not only that the husband had been the means of depriving his wife of all her available property, but that he had not even contributed to her maintenance since June, 1836, and that, ever since, she had been maintained by the bounty of her friends and relations. They referred to *Wright v. Morley* (1), *Watkins v. Watkins* (2), *Priddy v. Rose* (3), *Ball v. Montgomery* (4). * * *

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MARSHALL.
[582]

[*583]

Mr. Anderdon replied.

[584]

THE VICE-CHANCELLOR [referring generally to the cases cited in support of the exception, said] :

It may be true, where property has accrued to a married woman, and the question has arisen simply as to the amount of the settlement to be made on her out of it, that there is no case in which the Court has refused to give the husband a portion of it. But where, as in the present case, the husband, prior to the question arising, has received, or in any other manner had the benefit of a large portion of his wife's fortune, the question which the Court has to determine is a different one, namely, what is to be done with the remainder.

[His Honour then stated the Master's report, and concluded by saying:]

The circumstances of the case fully justify the conclusion to which the Master has come; and, if there is no precedent for doing what he has suggested, I will make one.

[587]

Exception overruled.

(1) 8 R. R. 69 (11 Ves. 12).
(2) 2 Atk. 96; see 98.

(3) 17 R. R. 24 (3 Mer. 86).
(4) 2 R. R. 197 (2 Ves. Jr. 191).

1845.
May 7.

SHADWELL,
V.-C.
[590]

CHOLMONDELEY v. CHOLMONDELEY.

(14 Simons, 590—591.)

A testatrix willed that, after payment of her legacies, the whole of her property should be given to her sister Mary, to be hers independent of any husband; and earnestly recommended her to take such measures as she might deem best for making it sure that, whatever she might inherit, might go, at her decease, to her children:

Held that the children, on their mother's death, were entitled to the property as joint-tenants, absolutely.

THE will of the testatrix in this cause, after giving some pecuniary legacies, proceeded as follows: "And my will is that, after the payment of the foregoing legacies, the whole of my property, in whatever it may consist, whether in possession or reversion, be given to my sister, Mary Elizabeth Johnson, to be hers independent of any husband: and I earnestly recommend her to take such measures as she may deem best for making it sure that, whatever she may inherit under this my will, may go, at her decease, to her children; or, if she should not have any, then to the children of my dear sister Eliza."

Mary Elizabeth Johnson married the defendant H. G. Cholmondeley, and died, in 1837, leaving the plaintiffs, who were infants, her only children. The defendant took out administration to his late wife.

The questions were, whether Mrs. Cholmondeley took an absolute interest in the property bequeathed to her, or whether her children became entitled to it, upon her death; and, if they did, whether they took as tenants in common or as joint-tenants.

Mr. Bethell and *Mr. Heathfield*, for the plaintiffs, contended that a clear trust was created for the plaintiffs, subject to their mother's life-interest.

[*591]

Mr. Tripp, for the defendant, said that the words used *by the testatrix in favour of the children of her sister, were not imperative, but merely recommendatory; and that the case bore a very close resemblance to *Ex parte Payne* (1), where the LORD CHIEF BARON held that no trust was created in favour of the children of the petitioner, but that the petitioner was entitled to the property absolutely.

The VICE-CHANCELLOR said that it was quite clear that the plaintiffs, on the death of their mother, became entitled to the testatrix's residuary estate, as joint-tenants, absolutely.

(1) 47 R. R. 473 (2 Y. & C. Ex. Eq. 636).

ATTORNEY-GENERAL *v.* EARL OF MANSFIELD (1).

(14 Simons, 601—602.)

1845,
June 6.

The purchase of land required for the furtherance of the objects of a charity licensed to hold land is not contrary to the policy of the Mortmain Acts.

SHADWELL,
V.-C.
[601]

THE petition prayed the Court to approve of and give directions for carrying into effect a scheme, which had been submitted to the *Attorney-General* and sanctioned by him subject to the question whether or not the Court would authorize the investment of any part of the charity monies in the purchase of real estates. The scheme embraced a variety of objects, particularly the sale of a part of the real estates of the charity, the application of part of the purchase-money to discharge a mortgage on another portion of the estates, and the investment of the residue, together with other monies belonging to the charity, (but which did not appear to have been given to it by will,) in the purchase of other lands which were convenient for enlarging the school and other buildings belonging to the charity.

The school was founded under the authority of letters patent, granted by Queen Elizabeth, which contained a license to hold lands to a greater extent than those proposed to be purchased together with those already belonging to it.

Mr. Bethell and *Mr. Godfrey* appeared for the petitioners.

Mr. Wray, for the *Attorney-General*, said that he did not desire to offer any opposition to the petition; but wished, merely, to submit to the consideration of the Court, whether it could authorize the proposed purchase: and he cited *The Attorney-General v. Day* (2), *Vaughan v. Farrer* (3), and *The Attorney-General v. Wilson* (4), in order to show that the Court had considered it to be contrary to the policy of the Mortmain Acts and to the practice of the Court, to allow money belonging to a charity to be invested in land, even for the purpose of enlarging the charity.

[602]

THE VICE-CHANCELLOR considered that this was not an application, simply, for the investment of money in land for the benefit of the charity; but that it embraced a variety of objects, one of which was the proposed investment, which was deemed by the trustees to be beneficial to the charity, and had not been disapproved of by the

(1) *Ex relatione*.

(2) 1 Ves. Sen. 218.

(3) 2 Ves. Sen. 182.

(4) 44 R. R. 314 (2 Keen, 680).

A.-G.
v.
EARL OF
MANSFIELD.

Attorney-General: and he made an order adopting the scheme and directing it to be carried into effect, without any reference to the Master, except to inquire whether a good title could be made to the lands proposed to be purchased.

1845.

June 9.

SHADWELL,
V.-C.

[622]

WARBURTON v. SANDYS.

(14 Simons, 622—632; S. C. 14 L. J. Ch. 431; 9 Jur. 503.)

A testator devised his real estates to A., B., C., and D., and their heirs, on certain trusts which required the legal estate to be vested in them, and gave a power of sale to them or the survivors or survivor of them or the heirs of the survivor, and declared that their or his receipts or receipt should be a good discharge to the purchaser, and, if any of them should die or decline to act, that it should be lawful and he thereby willed and directed that the survivors of them, should, immediately or within two months afterwards, by any deed, nominate some fit person to be a trustee in his place. D. died; and A. and B. by one deed, and C. by another (both of which were executed more than two lunar months, but less than two calendar months after D.'s death) nominated a new trustee, but did not convey the legal estate to him. A., B., C. and the new trustee, agreed to sell the estates to M., who objected to complete his purchase, first, because the appointment of the new trustee had not been made within two lunar months, secondly, because it had not been made by one single deed, and lastly, because the power of sale was suspended during the vacancy in the trust.

The Court overruled the objections; but held that the new trustee had not been duly appointed, because no conveyance had been executed to him; notwithstanding which, that A., B., and C. could make a good title and give an effectual discharge for the purchase-money (1).

The Court held also that the new trustee, though not duly appointed, might join with A., B. and C. in a suit for a specific performance.

JOHN ABERNETHY, surgeon, by his will dated the 17th of January, 1829, after directing that all his debts, funeral and testamentary charges should be paid and satisfied, and after making certain specific and pecuniary bequests to his wife, Anne Abernethy, gave, devised and bequeathed all his freehold, copyhold and leasehold estates, and all his money, securities for money, and all other his estate and effects except what he had thereinbefore given to his wife, to the plaintiffs J. Warburton, James Bourdillon and Chas. Lawrence, and to S. Arbouin, their heirs, executors, administrators and assigns, upon trust that they, or the survivors or survivor of them, or the heirs, executors or administrators *of such survivor,

[*623]

(1) But now see the Trustee Act, 1893, s. 10 (3), which enacts that every trustee appointed thereunder may act as a trustee as well before as after the trust property is vested in him.—O. A. S.

[should permit his said wife, Anne Abernethy, to receive the rents, or annual proceeds thereof, during her natural life,] so long as she should continue his widow, to and for her own absolute use and benefit; and, after her decease or second marriage, in trust for his sons who should attain twenty-one and for his daughters who should attain that age or marry, as tenants in common (1). And he declared that it should be lawful for his trustees, or the survivors or survivor of them, or the heirs, executors, administrators or assigns of such survivor, with the consent of his wife during her widowhood, or, after her decease or second marriage, by their or his own authority, to sell all or any part of his freehold, copyhold or leasehold estates, [and to give receipts for the purchase-money]; after which came the proviso on which the question in the cause arose:

WARBURTON
f.
SANDYS.

[624]

“Provided always, and my mind and will is that, if either of them, the said J. Warburton, S. Arbouin, Jas. Bourdillon, and Chas. Lawrence, the trustees hereinbefore named, shall happen to depart this life, or refuse, neglect, decline or become incapable of acting in the trusts thereby in them reposed, then and in every such case, it shall and may be lawful, and I do hereby will and direct that the survivors or survivor of them, or others or other of them, as the case may be, do and shall immediately, or within two months after any such trustee dying, or refusing, neglecting, declining or becoming *incapable of acting in the trusts hereby in him or them reposed, by any deed or writing under his or their hand and seal or hands and seals, to be attested by two or more credible witnesses, nominate some other fit and proper person or persons to be a trustee or trustees in the place and stead of the person or persons so dying, refusing, neglecting, declining, or becoming incapable to act in the execution of the trusts hereby in him or them reposed; which new trustee or trustees to be so nominated and appointed, shall have the same power and authority in the said trust premises, and in the execution of the trusts therein contained, as they, the said J. Warburton, S. Arbouin, Jas. Bourdillon, and Chas. Lawrence, or either of them, would have had or been entitled to, in case they had been living or had continued to act or been capable of acting in the execution of the trusts hereby in them reposed:” and the testator appointed them to be the executors of his will.

[*625]

(1) The words of limitation to the children (if any there were) were omitted in the brief.

WARBURTON
f.
SANDYS.

The testator died in April, 1831, and in the following month his executors proved his will.

A. Arbouin died on the 10th March, 1843; and [the plaintiffs Warburton, Bourdillon, and Lawrence, as the surviving trustees under the will, made and executed an indenture, dated the 9th of May, 1843, between themselves of the one part, and their co-plaintiff, George Burrows, of the other part, whereby Warburton, Bourdillon and Lawrence nominated and appointed Burrows to be a trustee in the place and stead of Arbouin, for all the purposes for which Arbouin was appointed a trustee by the will. The bill stated (p. 628) that this appointment was duly executed by Warburton and Lawrence in London, and that Bourdillon, being on that day in Dublin, then and there executed a duplicate of it, and that on the 13th of May, 1843, he executed the same indenture, which had been already executed by Warburton and Lawrence. In August, 1844, the plaintiffs, with the consent of the testator's widow, agreed, in writing, to sell part of the testator's freehold estates to the defendant, who declined to complete], alleging that the plaintiffs could not make a good title to the premises comprised in the contract, because the power of Warburton, Bourdillon and Lawrence, as such surviving trustees as aforesaid, to appoint a new trustee of the will in the place of Arbouin, terminated at the end of two lunar months after Arbouin's death, and, as the indenture of the 9th of May, 1843, was not executed until after the expiration of such *two lunar months, Burrows did not become a trustee of the will; and also because the testator had, by his will, required such vacancies as might happen in the trustees thereby originally appointed, to be supplied within the time therein limited; and therefore Warburton, Bourdillon and Lawrence, as such surviving trustees as aforesaid, could not, alone, after the expiration of the period in the will in that behalf expressed, exercise the power of sale in the will contained. * * *

[626] The bill prayed for a specific performance of the contract.
[*627] The defendant put in a general demurrer to it.

Mr. Bird and *Mr. Greening*, in support of the demurrer, said that the provision in the will as to the time within which a new trustee was to be nominated, must be held to be conditional and not directory; for, otherwise, it would be useless, and the power to appoint new trustees, must be read either as if the words, "within two months," were struck out of it, or as if the testator had added,

“or at any other time;” neither of which things could be done consistently with the established rules of construction :

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v.
SANDYS.
[629]

Secondly, that, in all legal instruments, the word, “month,” was taken to mean a lunar month, unless the context showed that a calendar month was intended :

Thirdly, that, if the provision as to time was merely directory, the proper means had not been adopted for appointing the new trustee ; for the appointment was required to be made by any deed or writing, which meant one, single deed or writing ; and that, though a power which was required to be executed by one deed, might be executed by more than one, yet they must refer to each other ; but, in the present case, neither of the deeds referred to the other : Sugd. on Pow., 6th edit., pages 290, 293 : in addition to which the deeds did not vest the legal estate in Burrows, as they ought to have done, (for there could be no doubt that the legal estate in fee was vested in the trustees named in the will,) but merely nominated him to be a trustee : *Foley v. Wontner* (1), where Lord ELDON, L. C., says, “The appointments of trustees are nothing, and the persons are no trustees till they can join in all the acts that form the duty of the trustees” : *Wilkinson v. Parry* (2).

Lastly, that the three surviving trustees alone, could not make a good title to the purchaser ; because, during the vacancy in the trusteeship, all the powers given by the will were suspended.

THE VICE-CHANCELLOR :

The testator does not say that if the surviving trustees do not exercise the power of appointing a new trustee, they shall not exercise any of the other powers given by the will ; but what he says is of an affirmative *nature. The question then is whether their other powers do not remain, notwithstanding they have failed to exercise that particular power.

[* 630]

Mr. Bacon, in support of the bill, said that the words used by the testator in the power of sale, were, “it shall and may be lawful, and I do hereby will and direct” : which were neither conditional nor imperative, but merely directory : *Doe v. Godwin* (3).

Secondly, that the intention of the party using the word, “month,” was to be the guide in determining whether it was to be taken to mean a lunar or a calendar month : *Franco v.*

(1) 22 R. R. 110 ; see 112 (1 Jac. & W. 245 ; see 248). (3) 1 Dowl. & Ry. 259. See 41 R. R. 640.

(2) 28 R. R. 84 (4 Russ. 272).

WARBURTON *Alvares* (1); *Hipwell v. Knight* (2); 2 Eq. Ab. 605, pl. 38: and
 F. SANDYS. that, in the present case, it was but reasonable to suppose that the testator intended, by it, a calendar month, which was its ordinary signification; and if so, the appointment of the new trustee had been made in due time:

Thirdly, that the words of the power did not require the appointment of a new trustee to be made by a single deed, but if they did, that either of the deeds that had been executed was a good appointment; for either of them showed what the intention of the parties was:

Lastly, that if the new trustee had not been duly appointed, the power of sale might be exercised by the surviving trustees; for it was given to the four named in the will and to the survivors of them.

Mr. Greening replied.

[631] THE VICE-CHANCELLOR:

The testator has not said anything about the appointment of a new trustee being made by one deed: he merely says, "by any deed or writing," and, in my opinion, it would have been good if it had been done by twenty deeds. He has merely pointed out the nature of the instrument. It strikes me that, in substance, there is nothing in the objection.

My opinion also is that, at present, no new trustee has been appointed; for, when the testator used the word, "nominate," he did not mean that the naming of a trustee was all that should be done. It is plain to me that, unless a conveyance was executed so as to give the person named a joint interest with the other three, no trustee was nominated within the meaning of the power. The testator meant that the person to be nominated should be a trustee just as the others were. If he had been nominated, and no conveyance had been executed to him, and all the others had died, how was he to execute any trust at all? He could not do it; for he would have no estate at all. The testator clearly meant that he should be nominated so as to become effectually a trustee.

But, although the surviving trustees have not named a new trustee as the testator wished, still I think that they remain trustees, with all the powers and duties confided to them by the

(1) 3 Atk. 342.

(2) 41 R. R. 304 (1 Y. & C. Ex. Eq. 401).

will; and that, when the four, for the sake of conformity, ordered the estate to be put up for sale, it was competent to them to file a bill, one for the sake of conformity, and the others in point of substance; and, if a receipt is given by the three trustees, it will be a good discharge to the purchaser.

My opinion is that the nomination has not been perfected; for the mere barren operation of nominating Dr. Burrows did not make him a trustee. [632]

Declare that the surviving trustees have the legal estate in them, and can make a good title and give a good receipt for the purchase-money.

CLARKE *v.* BICKERS (1).

(14 Simons, 639—642; S. C. 9 Jur. 678.)

1845.
June 24.

SHADWELL,
V.-C.
[639]

Premises were demised to A. and B., who were co-partners, upon which they carried on their partnership business. A. died during the lease, and, after his death, his executors carried on the business in co-partnership with B., on the premises: Held, nevertheless, that the covenants in the lease, which were joint only, were not to be considered as several as well as joint, so as to make A.'s estate liable for breaches of the covenants which occurred after his death.

By an indenture dated the 1st of April, 1825, and made between the plaintiff of the one part, and the defendant W. Mote and J. Appleford, therein described as of Little Warner Street, in the county of Middlesex, pawnbrokers, of the other part, the plaintiff, in consideration of the rents and covenants thereafter reserved and contained, on the part of Mote and Appleford, their executors, administrators and assigns, to be paid and performed, demised, to them, two messuages in Little Warner Street, for twenty-one years from the 25th of March preceding, at the yearly rent of 63*l.*; and they, for themselves, their executors, administrators, and assigns, covenanted with the plaintiff, his heirs, executors, and administrators, to pay the rent and keep the messuages in repair.

The bill, after stating as above, alleged that, at the date and execution of the indenture, Mote and Appleford carried on the business of a pawnbroker in partnership together; and that the premises comprised in the lease, were thereby demised to them as such partners and for the purposes of the partnership business: that, after the date and execution of the indenture, Mote and Appleford carried on their partnership business upon the

(1) *White v. Tyndall* (1888) 13 App. Ca. 263.

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v.
BICKERS.

[*640]

premises comprised in the indenture, and continued to carry on the same there down to Appleford's death : that Appleford died in May, 1826, having, by his will, appointed the defendants Bickers and Stephen Appleford, his executors : that the rent reserved by the lease being in arrear since the 29th of September, 1844, and the demised premises having fallen into a state of dilapidation, and *the defendants having refused either to pay the rent or to repair the premises, the plaintiff, in April, 1845, re-entered upon the premises, and had been, ever since, in possession of them, and had expended 180*l.* in repairing them ; and that that sum, together with 31*l.* 10*s.*, the arrears of rent, was owing to him from the defendants : that Mote was in insolvent circumstances, and wholly unable to pay the 211*l.* 10*s.*, and that Bickers and S. Appleford had refused to pay it. The bill charged that, although the covenants in the lease were expressed to be joint only, they ought, in equity, to be construed as joint and several : that, for some time after J. Appleford's death, Bickers and S. Appleford, as his executors, together with Mote, carried on the business upon the demised premises, which, in the lifetime of J. Appleford, had been carried on there by him and Mote ; and that ultimately they came to a settlement of accounts with Mote in respect of the business and the stock and effects thereof ; and that, in such account, the demised premises were included as part of the effects of the partnership between J. Appleford and Mote, or were, in some way, mentioned or noticed.

The bill prayed that the joint covenants in the lease might be decreed to be rectified (1), and made joint and several, and that Bickers and S. Appleford might be decreed to pay the 211*l.* 10*s.* to the plaintiff.

Bickers put in a general demurrer.

[*641]

Mr. Walker and *Mr. Phillips*, in support of the demurrer, *cited *Sleech's* case (2), *Sumner v. Powell* (3), and *Richardson v. Horton* (4), in order to show that, as the bill did not contain any allegation of mistake, nor state a case from which it could be inferred, the demurrer ought to be allowed.

THE VICE-CHANCELLOR :

The lease purports to be granted, by the lessor, in consideration

(1) The bill did not allege that the covenants were made joint only, by mistake. (3) 16 R. R. 136 (2 Mer. 30, and T. & R. 423).

(2) 13 R. R. 155 (1 Mer. 539).

(4) 6 Beav. 185.

of the rent and covenants thereafter reserved and contained. If the covenants had been more beneficial to him than they are, he would, perhaps, have granted the lessees a longer term.

CLARKE
v.
BICKERS.

Mr. Bethell and *Mr. Bird*, in support of the bill, said that they did not seek to have the lease corrected; but that the equity on which they relied was that the original engagement was a partnership engagement, and that the partnership had had the benefit of it: that every covenant in the lease was a partnership agreement, and the Court held every partnership agreement to be, in its nature, both joint and several: that the principle for which they contended was recognised by Sir WM. GRANT, in *Sumner v. Powell*, * * * and in *Sleech's* case.

The VICE-CHANCELLOR said that no equity arose, to the lessor, from the circumstance that the lessees were co-partners: that lessors were *domini factorum*, and determined, for themselves, how their leases should be granted: besides which, the right had accrued more than twenty years; for the lease was executed in April, 1825, and the bill was not filed until the 31st of May, 1845.

[642]

Demurrer allowed.

TURQUAND v. KNIGHT.

(14 Simons, 643—644; S. C. 9 Jur. 546.)

1845.
June 25.

Where a voluntary trust deed was set aside under 13 Eliz. c. 5, the trustee, who was aware that it contained a false recital, was refused his costs in the suit instituted to avoid the deed.

SHADWELL,
V.-C.
[643]

By an indenture dated the 20th March, 1840, John Chamberlain, in consideration of 400*l.* therein stated to have been paid to him by the defendant Knight, assigned certain leasehold tenements to Knight. By an indenture dated the following day, after reciting that the 400*l.* was not the proper money of Knight, but was part of the separate property of the defendant Elizabeth, the wife of John Chamberlain, and that Knight had received it from her, as he did thereby admit and acknowledge; Knight declared that he would stand possessed of the tenements upon certain trusts for the benefit of Elizabeth Chamberlain and her children: and he signed a receipt for the 400*l.* on the back of the deed. Shortly afterwards Chamberlain became bankrupt: whereupon the bill in the above cause was filed, by his assignees, to have the indentures declared fraudulent and void as having been executed by Chamberlain when he was in insolvent circumstances.

TURQUAND
v.
KNIGHT.

Knight, in his answer, admitted that he had neither received the 400*l.* from Mrs. Chamberlain nor paid it to her husband; and added that he executed the deeds at the request of Chamberlain, whose sister he had married, and that he was then ignorant that Chamberlain was insolvent; and that he had since given the assignees notice of the circumstances under which the deeds had been executed.

At the hearing of the cause, the Court granted the relief prayed by the bill. Upon which

[644] *Mr. Stuart and Mr. Piggott*, for the plaintiffs, submitted, on the authority of *Townsend v. Westacott* (1), that Knight was not entitled to his costs of the suit.

Mr. Bethell and Mr. Oliver, for Knight, said that he was made a party to the suit as a trustee; and that he had not been guilty of any improper conduct, but, on the contrary, had given important information and assistance to the plaintiffs: *Norcutt v. Dodd* (2).

The VICE-CHANCELLOR said that, notwithstanding Knight was made a party to the suit as a trustee, he ought not to be allowed his costs; for, by executing the second deed, and signing the receipt on the back of it, he admitted that he had received the 400*l.* from Mrs. Chamberlain, and thereby made himself an accessory to the fraud.

LLOYD v. LAVER (3).

(14 Simons, 645—648.)

1845.
June 28.
SHADWELL,
V.-C.
[645]

Under the old law relating to non-exclusive powers an appointment disposing of the whole fund was bad unless each child took a share of the capital thereunder.

ESTHER PARR, by her will dated the 2nd of May, 1793, gave 1,000*l.* South Sea Stock to trustees in trust for Ann Partridge for life, and, after her decease, in trust for all and every the child and children of Ann Partridge who should be living at the time of her decease, in such parts or shares and in such manner and subject to such directions, contingencies and restrictions as Ann Partridge should, by her will, direct or appoint, give or bequeath the same, and, for want and in default of such appointment, bequest or disposition of or in the said 1,000*l.* South Sea Stock or any

(1) 50 R. R. 193 (4 Beav. 58).

(2) 54 R. R. 224 (Cr. & Ph. 100).

(3) But 37 & 38 Vict. c. 37 (1874)

makes this case inapplicable to appointments made after that Act.—
O. A. S.

part thereof, by virtue and in pursuance of the said power, then the whole thereof, or such part or parts and so much thereof of which no such appointment or bequest should be made, and, if it should be in any way defective or incomplete, as and when it should cease and determine, should be in trust for the benefit of all and every the child and children of the said Ann Partridge who should be living at the time of her decease, in equal parts or shares if more than one, and if but one, then upon trust for such only surviving child, and should be transferred to them, him or her accordingly (1).

LLOYD
v.
LAVER,

The testatrix died shortly after the date of her will, leaving Ann Partridge surviving her. At the testatrix's death, Ann Partridge had five children, one son and four daughters, living, of whom three, whose names were Mary, Frances and Henrietta, alone survived her.

Ann Partridge, by her will dated the 14th of March, *1794, at which time all her children were alive, appointed the 1,000*l.* stock to trustees, in trust to pay the dividends to Henrietta, for life, and, after her decease, to Frances, for life, and, after the decease of the survivor of them, to their brother and two sisters, in equal third parts or shares, and, after the decease of any one of them, to the two survivors of them, in equal parts or shares, for their lives; and she directed that, after the decease of either of those two, the capital of the stock should be upon trust for the survivor of them and should be transferred to such survivor accordingly, unless either of her two last-named daughters should be the survivor; in which case she directed the trustees to pay the dividends to such surviving daughter for her separate use during her life, and that, after her decease, the capital should be upon trust for such person or persons and in such parts or shares and under and subject to such directions and restrictions as such surviving daughter, notwithstanding her coverture, should appoint, and, for want of such appointment, upon trust for her next of kin according to the Statute of Distributions.

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Ann Partridge, by a codicil dated the 18th of October, 1806, gave the 1,000*l.* stock, after the death of her daughter Henrietta, to her son, in trust to pay the dividends to her daughter Mary for life, and, after Mary's death, she directed the dividends to be divided between her son and her daughter Frances, and, after the death of her said son and daughter, the same to be equally divided between all her grandchildren.

(1) The above was correctly copied from the brief.

LLOYD

Ann Partridge died in May, 1822.

LAV^{ER}.

[*647]

The bill was filed by the husband and administrator *of her daughter Mary, praying that it might be declared that the will and codicil of Ann Partridge, or either of them, were not a good execution of the power reserved to her by the will of Esther Parr; and that, on her death, the 1,000*l.* became divisible, as in default of appointment, between her three daughters, Mary, Frances and Henrietta, as her only children living at her death.

Mr. Stuart and *Mr. Campbell*, for the plaintiff, said that the power given to Ann Partridge, was not an exclusive power, but a power to distribute the fund amongst all her children living at her death; and, consequently, that it did not authorize her to appoint (as she had done) the whole of the dividends to one of those children for life: *Alexander v. Alexander* (1).

Mr. Anderdon and *Mr. Smythe*, for the personal representatives of Henrietta Partridge, contended that the appointment was good so far and so far only as it directed the dividends of the fund to be paid to Henrietta for her life. They cited *Phipson v. Turner* (2), *Sadler v. Pratt* (3), [and other cases].

Mr. Whitmarsh, *Mr. Koe*, *Mr. Rudall*, *Mr. Freeling*, and *Mr. Southgate*, appeared for the other parties.

THE VICE-CHANCELLOR :

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If a fund is given in trust for all and every the child and children of A. who shall be living at the time of her decease, in such parts or shares and in such manner *as A. shall appoint, can it be said that an appointment of the whole income of the fund to one of the children for life, with remainder to another of them for life, is an appointment of the fund to all the children, in shares? I apprehend that no appointment can be a good execution of such a power, unless it gives a share of the capital to each of the children; which the appointment in question does not do: therefore, I have not the slightest doubt that it is invalid.

Decree according to the prayer of the bill.

(1) 2 Ves. Sen. 640.

(3) 35 R. R. 92 (5 Sim. 632).

(2) 47 R. R. 229 (9 Sim. 227).

LANE *v.* HUSBAND (1).

(14 Simons, 656—662; S. C. 9 Jur. 1001.)

1845.
June 30.SHADWELL,
V.-C.
[656]

A debtor conveyed all his property to trustees for his creditors, in consideration of a licence and release granted to him by the deed; and afterwards died. Seven years after his death, a creditor, who had notice of the deed shortly after its execution but did not execute it, filed a bill to be allowed to execute it and to have the benefit of it. But the Court dismissed the bill, because the debtor could not have the benefit of the consideration.

By indentures of lease and release and assignment, dated the 17th and 18th of March, 1880, the release and assignment being made between J. W. Bozon of the first part, the defendants Herbert James Husband and Jos. Thos. Austen Treffry, of the second part, and the several other persons, creditors of Bozon, whose names and seals were subscribed and affixed to the schedule thereunder written, of the third part, after reciting that Bozon was indebted to the several persons mentioned in the schedule, in the sums set opposite to their respective names, but, being then unable to pay the whole amount of his said debts, he had agreed to surrender, assign and assure all his real and personal property to the defendants upon trust to pay and satisfy the same in manner thereafter expressed; Bozon, in pursuance of the agreement and in consideration of ten shillings and of the licence and release thereafter contained, conveyed and assigned all his freehold, leasehold and personal property to the defendants, their heirs, executors, administrators and assigns, in trust, as soon as conveniently might be, to sell or mortgage his freehold and leasehold property, and, out of the proceeds and out of his personal estate, to pay the debts and demands owing by him to such of his creditors whose names and seals were subscribed and affixed to the schedule, or their executors, administrators, partners or assigns, rateably and in proportion to the amount of the debts or sums of money owing to them respectively, and which sums were set opposite to their names respectively, and without any priority or preference of any one *or more of them to the other or others of them, until each of the said creditors, or his or her executors or administrators, partners or assigns, should have received the full amount of the debts owing to him, her or them respectively, and to pay the surplus of the trust monies and convey the estates

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(1) *In re Baber's Trusts* (1870) L. R. 10 Eq. at pp. 554, 556, 40 L. J. Ch. 144, MALINS, V.-C., said: "The case of *Lane v. Husband*, which has been cited, appears to stand entirely

by itself, and I should have great difficulty in following it." And see *In re Meredith* (1885) 29 Ch. D. 745, 54 L. J. Ch. 1106.—O. A. S.

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remaining undisposed of, to Bozon, his heirs, executors, &c.: and the defendants covenanted with the persons parties to the indenture of the third part, that they would, from time to time, or as often as any monies should be received by them, or either of them, by virtue or in pursuance of the indenture, distribute, apply and dispose of the same upon and conformably to the several trusts and in the manner thereinbefore declared or expressed concerning the same and the true intent and meaning of the indenture: and the indenture further witnessed that, in consideration of the premises, the several persons parties thereto of the third part, did thereby, for themselves severally and respectively and for their several and respective executors, administrators and assigns, and not for the acts and deeds of the other or others of them, but each of them for himself only, his heirs, executors and administrators, covenant with Bozon, his executors and administrators, that they or their respective heirs, executors, administrators or assigns, should not nor would, at any time or times thereafter, commence or prosecute any action or actions, suit or suits at law or in equity, against Bozon, his heirs, executors or administrators, or make any attachment of or upon his or their estates or effects, for or by reason of any debt or debts then owing by him to them or any or either of them, their or any or either of their respective heirs, executors, administrators or assigns; and, in case any or either of the parties thereto of the third part, their or any or either of their respective heirs, executors, administrators *or assigns, should commence any such action, suit or attachment contrary to the true intent and meaning of the indenture, that then and in such case Bozon, his heirs, executors and administrators, might plead the indenture, as a general release, in bar of all and every such actions, suits or attachments.

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The indentures of lease and release and assignment were executed by Bozon and also by the defendants on the day of the date of the release and assignment, and the execution thereof by each of them, was attested by a solicitor of the Court of Chancery; and, on the 30th of April, 1830, notice of the execution of the indentures, was given, by Bozon and the defendants, in the *London Gazette* and in one London morning newspaper and in one newspaper published near to Bozon's residence; and such notice contained the dates and execution of the indentures and the names and residences of the defendants and of the witnesses to the execution thereof. A written notice was also given by the defendants, to the plaintiff, of the execution of the indentures, and that the release and assignment

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was lying at the office of Mr. James Husband, attorney-at-law in Devonport, for the perusal and signature of the plaintiff and the other creditors of Bozon: and the defendant, Husband, and his partner, Thomas Husband the elder, executed the release and assignment in respect of a partnership debt due to them from Bozon: and the bill alleged that Thomas Husband the elder claimed an interest in the matters in question in the suit, and was desirous that the trusts of the release and assignment should be executed. The bill further alleged that the plaintiff, not being in the neighbourhood of Devonport, and there not being a prospect of an early distribution of Bozon's effects, did not then execute the deed, but, *fully relying upon the defendants' duly executing the trusts which they had undertaken and of which notice had been given to him as aforesaid, he assented thereto and took no measures to impede the execution of the trusts or frustrate the purposes of the deed, nor had he ever acted in opposition to the defendants in duly performing the trusts: that Bozon died on the 23rd of May, 1833, intestate, and letters of administration of his personal estate and effects were, on the 22nd of October, 1834, granted to the defendant Husband: that he and Treffry had accepted the trusts of the indenture of the 18th of March, 1830, and had, from time to time previously and subsequently to the death of Bozon, sold and converted into money all the real and divers parts of the personal estate and effects conveyed and assigned to them, and possessed themselves of the produce thereof in conformity with the trusts of the indenture, and, in particular, they had been recently declared to be entitled, as such trustees, to a sum of 2,935*l.* 13*s.* 5*d.*: that the trust created by the indenture of the 18th of March, 1830, was still a valid and subsisting trust, of which the plaintiff, as a bond-creditor of Bozon for 1,149*l.* 3*s.* 6*d.* was entitled to the full benefit; and that he had applied to the defendants and offered to execute the release and assignment, and requested them to produce it to him for that purpose, and, after the execution thereof, to pay to him what should be found due to him on a rateable division, between all the creditors who had executed the same, of the clear assets which had come to their hands by virtue thereof and of the lease for a year on which the same was grounded. The bill charged that Bozon, when he executed the indentures, was subject to the bankrupt laws, and that the indentures were executed in conformity with the provisions *of the Act of the 6 Geo. IV. c. 16 (1), for amending

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(1) Rep. 12 & 13 Vict. c. 106: see now Bankruptcy Act, 1883 (46 & 47 Vict.-c. 52).

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the laws relating to bankrupts. The bill prayed that it might be declared that, on the 17th day of March, 1830, the plaintiff was a creditor of Bozon to the amount of 1,149*l.* 3*s.* 6*d.*, and that, under the circumstances aforesaid, the plaintiff ought to be permitted to execute the release and assignment, and to have the benefit thereof as a creditor to such amount as aforesaid; and that the defendants might be directed to produce the same for that purpose; and that the trusts of it might be performed and carried into execution under the decree of the Court; and that an account might be taken of all sums of money which the defendants had received under the lease and release and assignment, or which they might have received without their wilful neglect or default, and of the application thereof, and that they might be restrained from receiving the 2,935*l.* 13*s.* 5*d.*, and that that sum might be transferred into the name of the Accountant-General in trust in this cause, and, together with the produce of the real and personal estate and effects then subject to the trusts of the release and assignment, be duly applied according to such trusts under the decree of the Court.

The defendants, in their answer, said that the first intimation which they received of any claim, on the part of the plaintiff, to execute the release and assignment, or of any debt being alleged to be due to him from Bozon, was in May, 1840; and they submitted whether he was entitled then to execute the deed.

[*661] *Mr. K. Parker*, and *Mr. E. F. Smith*, for the plaintiff, said that no time was limited for the creditors to execute the release and assignment: that *Garrard v. *Lord Lauderdale* (1) and *Wallwyn v. Coutts* (2) were not applicable to the present case; for notice of the deed was given to the creditors, and one of them had executed it; and the trustees had dealt with the property, and otherwise acted in performance of the trusts, and, consequently, the relation of trustee and cestui que trust was established between them and the creditors: besides which the deeds had been executed according to the 4th sect. of the 6 Geo. IV. c. 16, which circumstance was alone sufficient to give them validity: *Acton v. Woodgate* (3), *Bill v. Cureton* (4), *Field v. Lord Donoughmore* (5).

(1) 30 R. R. 105 (3 Sim. 1; 2 Russ. & My. 451).

(2) 17 R. R. 173 (3 Mer. 707).

(3) 39 R. R. 251 (2 My. & K. 492).

(4) 39 R. R. 258 (2 My. & K. 503; see 511).

(5) 58 R. R. 253 (1 Dr. & War. 227).

(THE VICE-CHANCELLOR: When was the bill filed?)

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On the 22nd of December, 1840.

Mr. Bethell, Mr. Stuart, Mr. Bacon, Mr. Cole and Mr. Freeling appeared for the defendants: but

THE VICE-CHANCELLOR, without hearing them, said:

I accede to what is laid down, by the LORD CHANCELLOR OF IRELAND, in *Field v. Lord Donoughmore*, namely, that, where a debtor has executed a deed similar to that in the present case, it is not absolutely necessary that a creditor should have executed it, in order to entitle himself to the benefit of it, provided he has complied with its terms.

In this case, the release and assignment are expressed *to be made in consideration of the licence and release thereafter contained, that is, in consideration of a licence and release to be granted, to the debtor, in his lifetime. The creditor who now seeks the benefit of the deed by which that release and assignment were made, had notice of the deed, part of which is the consideration; and, having had notice of it, he did not choose to give the consideration.

[*662]

Transactions similar to that now under consideration, are in the nature of bargains. The deed was executed in March, 1830. The debtor lived more than three years afterwards, and then died; and the bill was not filed until seven years after his death. How then can he be placed in the situation in which he bargained to be before he executed the deed?

No case has been cited in which this Court has given the benefit of a deed, conceived in terms similar to that in the present case, to a creditor who did not execute it in the lifetime of the debtor. And my opinion is that the Court ought not to give a posthumous effect to a deed, where the parties cannot be placed in the position which they stipulated for: and, therefore, I shall dismiss the bill with costs.

CHANCERY COURT IN IRELAND.

COLE v. SEWELL (1).

1842.

June 6.

1843.

April 21, 25,
27.SIR EDWARD
SUGDEN,
L.C.

[1]

(4 Dr. & War. 1—38; S. C. 6 Ir. Eq. R. 66; 2 C. & L. 344; affirmed, 2 H. L. C. 186—238; S. C. 12 Jur. 927.)

By a settlement, lands were limited to trustees, to the use of the settlor for life, with remainder, subject to a term of ninety-nine years, to the use of his three daughters, for their lives, as tenants in common, with remainder to trustees, during the life of each daughter, to preserve contingent remainders, with remainder as to the share of each daughter, at her death, to the use of her first and other sons successively in tail male, with remainder, in case of the death of any one or more of the daughters without issue male, to the use of the survivors or survivor during their or her respective lives and life, with remainder, in like manner, as to the original share, to the use of the first and other sons of such surviving daughters or daughter in tail male, with remainder, in case all the daughters should die without issue male, as to the share of each, to the use of the daughters as tenants in common in tail; and in case one or more of the daughters should die without issue, it was provided, that the share or shares of such daughter or daughters, should go to the use of the daughters of such survivors or survivor, as tenants in common in tail general: the ultimate remainder was limited to the use of the settlor in fee:

Held, that the limitation, in case of the failure of issue generally of any of the daughters, to the daughters of the survivors or survivor, was a good contingent remainder, and not void for remoteness.

Held, also, that the words "survivors or survivor," were to be read "others or other," and, consequently, that the limitation over to the daughters of one of the settlor's daughters who had issue, was not defeated by the death of that daughter in the lifetime of another, who subsequently died without issue, but that the limitation took effect as a good cross remainder.

A limitation by way of remainder cannot be void for remoteness.

General powers of sale and exchange in a settlement are good.

[THIS case will be reported more fully in a later volume of the Revised Reports from 2 H. L. C., on appeal to the House of Lords, where the decision of the LORD CHANCELLOR upon the points mentioned in the above head-note was affirmed, but it will be convenient to retain here certain passages in the judgment of the LORD CHANCELLOR containing general statements of great weight and authority upon the law of real property, and showing that in his opinion the rule against perpetuities had no application to legal remainders.

The judgment contains a sufficient explanation of the limitations of the settlement under which the questions stated in the head-note were raised to make the selected passages intelligible.—O. A. S.]

(1) *In re Frost* (1889) 43 Ch. D. 246, v. *Mitchell* (1890) 44 Ch. Div. 85, 59 59 L. J. Ch. 118, 62 L. T. 25; *Whitby* L. J. Ch. 485, 62 L. T. 771.

THE LORD CHANCELLOR :

In this cause, I sent a case to the Judges of the Court of Common Pleas, for their opinion upon certain questions of *law, arising out of a settlement, and the Judges having returned their certificate, the questions have been argued before me at great length, but not at greater length than the difficulty of some of them justified. I have considered the case with great attention, and I am now prepared to state the conclusions at which I have arrived.

The facts are somewhat complicated, particularly from the state of the family, as connected with the devolution of the different shares of the daughters. There were two estates, one was settled in the usual way, with uses regularly limited, and in regard to which no question arises, except that an argument has been founded upon them, bearing upon the construction of the settlement of 1779. The settlement of 1752, upon which the main question of law depends, was a settlement of certain estates to the use of the father, Peter Daly, for his life, subject to dower for Elizabeth, his wife; remainder, after a term to which I need not particularly advert, to the use of his three daughters, as tenants in common for life; remainder to trustees to preserve, &c., with regular remainders, as to the several shares of his daughters, to their respective sons successively in tail male, as tenants in common. Then follows a regular limitation over, upon which some argument has been founded, but which, in my opinion, cannot be sustained in point of law, because this regular limitation over, in case of default of issue male of the daughters cannot affect the construction of the subsequent limitations over. The limitation in default of issue male of the daughters is, as to their respective shares, to the use of their respective daughters as tenants in common in tail. So far there can be no question.

Then comes the first clause, upon which the great question arises; “and in case one or two of the said daughters of the said Peter Daly should happen to die without issue of her or their body or bodies, then as to the share or shares of the lands and premises aforesaid of such daughter or daughters so dying without issue, to the use of all and every the daughter and daughters of such survivors or survivor, share and share alike, as tenants in common, and not as joint tenants, of the respective shares of such survivors, in case of two survivors, to the daughter and daughters of such survivor, in case there be but one, as tenants in common, and not as joint-tenants, and the heirs of the body and bodies of all and every the

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[*25]

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daughter and daughters of such survivors or survivor; and in case the said Honoria, Lady Kingsland, Anastasia Daly, and Margareta, Lady Athenry, should happen to die without issue, then to the use of Peter Daly, &c.; " that is to say, with cross-remainders between the daughters in tail, provided the limitation be good. I do not understand that the validity of this limitation is disputed, except upon two grounds. First, it is said, that this is not a good contingent remainder at all, but a shifting or secondary use, and, being limited to take effect upon a general failure of issue, it is too remote; and secondly, that it is not a good cross-remainder, for it was said, that the word " survivors " must be construed literally, and cannot be read " others." The question then arises, first, generally, is this a good contingent remainder? and secondly, is there a good contingent remainder, so as to carry the estate by way of cross-remainder over to the issue of the daughter, who died in the life-time of the sisters, leaving issue?

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The first question depends upon this; the first limitation *being only to the issue male of the daughters, which of course would not include issue female of the sons of the daughters; and the next limitation, although to the daughters of the daughters in tail, not exhausting the whole line of the issue of the daughters, the gift over is beyond the natural termination of the preceding limitations, because the gift over is only to take effect in case of the daughters dying without issue of their bodies generally, and there is no preceding limitation embracing the whole line of the daughters' issue. It is said this is not a good contingent remainder, and that *Jack d. Westby v. Fetherstone* (1) is not an authority, and the counsel for the plaintiffs have endeavoured upon this point to sustain a distinction between the cases, by the aid of certain passages of the judgment delivered in that case; but, notwithstanding those expressions, I am clearly of opinion, that the Judges in *Jack v. Fetherstone* meant to decide the abstract legal proposition, and I must consider it as an authority. It is said, however, that in the present case, this is not a contingent remainder, but a future, or secondary, or springing use, and being to take effect in default of issue generally, it is too remote, and therefore void.

Now, if there be one rule of law more sacred than another, it is this, that no limitation shall be construed to be an executory or shifting use, which can by possibility take effect by way of remainder, and the case of *Carvadine v. Carvadine* (2), explained

(1) 2 Huds. & B. 320.

(2) 1 Eden, 27.

in the note to Gilbert (1), establishes this position. In that case, Lord Keeper HENLEY went much out of his way to apply the rule; he transposed the proviso, and put the gift in a regular course of limitation, *in order to give effect to it as a contingent remainder; he laid down the general rule in the strongest terms, and with precision, and I consider the rule to be one of universal application.

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As to the question of remoteness, at this time of day, I was very much surprised to hear it pressed upon the Court, because it is now perfectly settled, that where a limitation is to take effect as a remainder, remoteness is out of the question: for the given limitation is either a vested remainder, and then it matters not whether it ever vest in possession, because the previous estate may subsist for centuries, or for all time; or it is a contingent remainder, and then, by the rule of law, unless the event, upon which the contingency depends, happen, so that the remainder may vest *eo instanti* the preceding limitation determines, it can never take effect at all. There was a great difficulty in the old law, because the rule as to perpetuity, which is a comparatively modern rule (I mean of recent introduction, when speaking of the laws of this country), was not known, so that, while contingent remainders were the only species of executory estate then known, and uses, and springing and shifting limitations were not invented, the law did speak of remoteness and mere possibilities as an objection to a remainder, and endeavoured to avoid remote possibilities; but since the establishment of the rule as to perpetuities, this has long ceased, and no question now ever arises with reference to remoteness; for if a limitation is to take effect as a springing, shifting, or secondary use, not depending on an estate tail, and if it is so limited, that it may go beyond a life or lives in being, and twenty-one years, and a few months, equal to gestation, then it is absolutely void; but if, on the other hand, it is a remainder, it must take effect, *if at all, upon the determination of the preceding estate. In the latter case, the event may or may not happen, before, or at, the instant the preceding estate is determined, and the limitation will fail, or not, according to that event. It may thus be prevented from taking effect, but it can never lead to remoteness. That objection, therefore, cannot be sustained against the validity of a contingent remainder. If the remainder over had been regularly in default of issue male of the daughters, it would have taken effect, when and if that failure happened. Now the

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remainder over is in default of issue generally, but it can only take effect, when and if there is a failure of issue male, that is, upon the regular determination of the previous estate; there is no distinction in point of perpetuity between the limitations; either can only take effect at the same period. The simple distinction is, that although the event happen, the latter gift—depending upon the contingency—may never take effect; but that introduces no question of remoteness.

What other objection, then, can be taken to this as a contingent remainder? This limitation appears to me to be one of the most regular, technical, contingent remainders, that can be conceived. The estate is first limited to the daughters for their respective lives, with remainder to their sons in tail male, with remainder to the daughters of the daughters in tail general; and then, if the daughters die without issue, remainder over. What can be more regular? If the remainder over take effect at all, it must take effect immediately upon the natural determination of the preceding estates: for if at the time of failure of issue male of the daughters, there should be also a failure generally of their issue, then the preceding limitations are subsisting up to the *time, at which the contingent remainder over is limited to take effect, and are only exhausted at that moment; and supposing that at the determination of those preceding limitations, there are other issue of the daughters—issue female of their sons, for instance, who do not take estates under those preceding limitations, then the contingency does not happen, upon which the remainder was to take effect, although the preceding estates are determined, and the remainder over is consequently destroyed. The limitation, therefore, plainly falls under Mr. Fearn's second class of contingent remainders, which is thus defined: "Where some uncertain event, unconnected with, and collateral to, the determination of the preceding estate, is, by the nature of the limitation, to precede the remainder. As if a lease be made to A. for life, remainder to B. for life, and if B. die before A., remainder to C. for life: here the event of B.'s dying before A. does not in the least affect the determination of the particular estate, nevertheless, it must precede and give effect to C.'s remainder; but such event is dubious; it may or may not happen, and the remainder depending on it is therefore contingent" (1). This example is a clear contingent remainder, but the preceding estates will not determine until their natural expiration.

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Mr. Fearne then puts this case taken from Leonard (1) ; “ So, if lands be given to A. in tail, and if B. come to Westminster Hall such a day, to B. in fee. Here B.’s coming to Westminster Hall has no connexion with the determination of A.’s estate ; but as it is an uncertain event, and the remainder to B. is not to take place, unless it should happen, such remainder is, therefore, a contingent remainder.” Now, *this must be read thus : “ If B. come to Westminster Hall such a day, remainder to B. in fee ; ” for B.’s estate was not intended to take effect in derogation of the preceding estate ; it was the case of a limitation to one in tail, and after the determination of that estate, if B. should come to Westminster Hall on a given day, then to another. What is that but a regular limitation after the determination of the preceding estate, but depending upon a collateral event ? Is not that exactly this case ? The limitation here is to a particular class of the issue of the daughters, and a gift over, if the daughters die without issue generally. The contingency here, then, is the death of the daughters without issue. Is there any objection to the nature of this contingency ? The previous estates are to continue until their natural determination ; the remainder over depends on an event collateral to the determination of the previous estates. The nature of that collateral event is unimportant. Whether it be a dying without issue, a particular tree standing or falling, a party coming to Westminster Hall, or whatever be the event, on which a man in his caprice may choose to rest the contingency, upon which the limitation over is to take effect, is perfectly indifferent.

[* 31]

The first instance of Mr. Fearne is taken from Coke Littleton (2), and the passage shows there was then a difficulty about remote possibilities, which does not exist at this moment. Lord Coke, speaking of this, says : “ So it is if a man make a lease for life to A., B., and C., and if B. survive C., then the remainder to B. and his heirs : here is another exception out of the said rule, for albeit the *person be certain, yet inasmuch as it depends upon the dying of B. before C., the remainder cannot vest in C. presently : and the reason of both these cases in effect is, because the remainder is to commence upon limitation of time, viz. upon the possibilitie of the death of one man before another, which is a common possibilitie.” The concluding words show, that in those early times they were looking to the period when the contingency might arise. The effect, however, of the modern rule against perpetuities

[* 32]

(1) 4 Leon. 237.

(2) Co. Litt. 378 a.

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has been to render this doctrine obsolete, although it has rendered void successive life estates to successive unborn classes of issue. In *Nicholls v. Sheffield* (1) the Court held that a proviso for shifting an estate after an estate tail was valid ; and Lord KENYON, who was then at the Rolls, would not listen to an argument founded on remoteness, because the limitation over might at any time be barred by the previous tenant in tail.

The question has often been discussed in recent times, how far the general powers of sale and exchange, which are usual in settlements, are good, and their validity has been doubted. I cannot say that I entertain any doubt upon the point. I think that they are perfectly good, although not in terms confined within the rule against perpetuities, and upon this principle, that such powers may be barred by the owner of the preceding estate tail ; and if once an estate in fee has been acquired by any one claiming under the limitations of the instrument, by which the power was created, it naturally ceases.

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The present limitation, then, is a good contingent remainder ; and I have now to consider whether in its terms it created valid cross-remainders. It has been insisted that *Doe v. Wainewright* (2) is not an authority to rule this case, and that it has not been acted on with respect to deeds : but I cannot agree with this position, for I have always thought that the Judges in that case only applied to deeds that sound and sensible construction, which had previously been confined to wills. I am not now speaking of implied cross-remainders, but I am speaking of the word “survivors” being construed to have the same effect as “others,” in favour of the intention. The settlor plainly intended that upon failure of the issue of one daughter, the property should go to the other daughters and their issue : it may happen that the exact description is not answered by the event, but there is no magic in the words, and the intention is perfectly evident.

Taking the whole together, the settlor was looking to the event on which the estate was to go over ; but he certainly did not mean, that the circumstance of one of his daughters being actually alive at the time of the death of another without issue should be the event, upon which was to depend the taking effect of the limitation, in words, to the survivor and her issue. In this construction I am not laying down the law for the first time. I merely follow the rule of law, as laid down in the case of *Doe v. Wainewright* by

(1) 2 Br. C. C. 215.

(2) 2 R. R. 634 (5 T. R. 427).

much higher authority, and I follow it readily, because I consider it a sound and sensible rule of construction, and because, in this case, it enables me to give effect to *the plain intention of the party, without doing the least violence to the language he has used. I hold, therefore, that these cross-remainders were well created.

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SEWELL.
[*34]

[The remainder of the judgment deals with other points which are not included in this report.]

KEILY v. KEILY.

(4 Dr. & War. 38—58; S. C. 2 C. & L. 334.)

1843.
April 26, 29.

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[38]

[THIS was a case in which a question was raised upon the construction of a settlement whether a power of charging portions upon real estate was effectually exercised by a father so as to make the portion raisable in his own lifetime for a daughter who had attained the age of 21 years. The question does not appear to have presented any real difficulty, and is only noted here in order to preserve a passage from the judgment of the LORD CHANCELLOR, who, in considering the possibility of the abuse of such a power, said:]

But if even such an abuse should be attempted, a court of equity is not powerless to guard against it. *Lord Sandwich's* case (1) decided this; there a father, who had a power of appointment among his children, supposing that one of them was in a consumption, executed his power in favour of that child, and the Court declared the appointment to be void, being of opinion that the object of the appointor, when he made the appointment, was that he might himself have the chance of getting the share, as administrator of his child. I apprehend, therefore, that if a father, with such a power, *charges a portion for his child, not because the child wants it, but because the child is delicate in health, and likely to die, this Court has authority to defeat such an act. There can be no doubt that this Court has full power to restrain any undue, I mean any fraudulent, execution of the power. In the present case there is no pretence or suggestion of anything like fraud. The question raised is merely one of construction.

[55]

[*56]

(1) Mentioned in *M'Queen v. Farquhar*, 8 R. R. at p. 221 (11 Ves. 479).

1843,
April 28.

SIR EDWARD
SUGDEN,
L.C.
[117]

TAYLOR *v.* EMERSON.

(4 Dr. & War. 117—123; S. C. 6 Ir. Eq. R. 224; 2 C. & L. 558.)

Property was conveyed by a tenant for life to a trustee upon trust out of the interest, proceeds or annual rent thereof to make certain annual payments and also to pay to the plaintiffs an antecedent debt with interest until the same should be paid off, and upon payment to reconvey to the grantor: Held that the plaintiffs were not to be considered as mortgagees, or entitled to a sale, but only to have a receiver, and the trusts of the deed carried into execution under the direction of the Court.

By indenture bearing date the 21st of November, 1837, and made between John Jervis Emerson, of the first part, Christopher Taylor and William Taylor, of the second part, and Francis T. Porter, of the third part, after reciting a lease of the 27th of May, 1816, whereby John Staunton Rochfort demised the town and lands of Ballybanogue, situate in the county of Wexford, to Michael Emerson (the father of John Jervis Emerson), for three lives or thirty-one years, whichever should last the longest, at the yearly rent of twenty-four shillings per acre; and after reciting further a deed of the 8th of January, 1824, which was the settlement executed upon the occasion of the marriage of the said John J. Emerson with Miss Jane Daly, whereby the lands comprised in the said lease were settled, after the death of the father and mother of the said John Jervis Emerson, upon John Jervis Emerson for life, subject to an annuity of 50*l.* for his sister, Jane Emerson, with remainder to his issue; and after reciting further, that Michael Emerson and Margaret Emerson, the father and mother, were both dead, and that John Jervis Emerson was indebted to Christopher Taylor and William Taylor in the sum of 400*l.*, and had agreed to convey his life interest to Francis T. Porter as a trustee, for the purpose of securing the repayment of said sum, and also for the other purposes thereafter mentioned and expressed, the said deed witnessed, that the said John Jervis Emerson conveyed the said premises, and all his *estate and interest therein, to Francis T. Porter, and his heirs, for and during the life of the said John Jervis Emerson, in trust, out of the interest, proceeds, or annual rent thereof, to pay the head-rent payable on said premises, under and by virtue of the said lease of the 27th of May, 1816, and also the premium of insurance on the life of the said John Jervis Emerson, insured with the Eagle Insurance Company for the sum of 500*l.*, and also to pay over to the said Christopher Taylor and William Taylor the said sum of 400*l.*, with legal interest from the day of the date thereof, at the

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rate of 6*l.* by the year for every year, until the same should be paid off and discharged, and from and after the payment thereof, then to reconvey to the said John Jervis Emerson, or his assigns, the said demised premises; and further, it was agreed by and between the parties, that the said Francis T. Porter should have power to pay off and discharge the said sum of 400*l.*, by instalments of sums not less in amount than 40*l.*, and that the said Christopher and William Taylor, their executors, administrators, and assigns, should accept of the same.

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EMERSON.

The deed then contained covenants on the part of John Jervis Emerson, for good title and further assurance, and a proviso, that John Jervis Emerson, notwithstanding any thing therein contained, should be at liberty to make leases for any term of years not exceeding thirty-one years, at the best improved rent, and without fine: there was no covenant in the deed for payment of the 400*l.*

By deed of the 28th of December, 1837, reciting the deed of the 21st of November, 1837, and that John Jervis Emerson was indebted to the said Christopher and William Taylor in the sum of 400*l.*, John Jervis Emerson assigned *to Francis T. Porter the policy of insurance with the Eagle Insurance Company, together with all interest and advantage to be had thereby, to the extent, however, and to the amount only of such losses as the said Messrs. Taylor should sustain by reason of the aforesaid loan, and to the uses and upon the trusts of the said deed of the 21st of November, 1837.

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The bill was filed by the Messrs. Christopher and William Taylor stating these two deeds; that Porter had not executed same, or gone into possession of the lands thereby conveyed to him; that the whole of said sum of 400*l.* was still due to the plaintiffs, and also a large sum for premiums paid by the plaintiffs for the purpose of maintaining the said policy of insurance.

The bill prayed that the plaintiffs might be considered as mortgagees of the premises comprised in the deed of the 21st of November, 1837, and that an account might be taken of what was due to them for principal and interest, and also for the amount of premiums paid by them on said policy of insurance, and that what should be so found due, should be declared to be a charge upon the said lands and premises, and for payment of said sum by the defendant Emerson; and in default thereof, for a foreclosure and sale; or if the Court should be of opinion, that the plaintiffs were not entitled to a sale, then that an account might be taken of

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the rents and profits of the lands and premises from the 21st of November, 1837, and that Emerson should account for what he had received, or without wilful default might have received, and that Emerson should be decreed to pay to the plaintiffs what should be so found due and owing for principal and interest, and premiums as aforesaid; and *that in default thereof, Emerson might be decreed to convey to the plaintiffs, or to a trustee for their use, the said lands, by indenture of mortgage, or in such other manner as the Court should consider proper, and for a receiver.

The defendant, Porter, by his answer to the bill, stated that he had never in any manner interfered in the trusts of the deed of the 21st of November, 1837, and submitted to act as the Court should direct.

The defendant, Emerson, did not put in any answer, and an order was obtained to take the bill *pro confesso* against him. The cause now came on to be heard upon this order, and upon bill and answer as against the defendant, Porter.

Mr. M'Kenna, and Mr. Francis Brady, for the plaintiffs :

The deed of November, 1837, though, perhaps, not in terms a mortgage, was yet evidently intended by the parties to be substantially so. An antecedent debt is recited to have existed, and the instrument in question was executed to secure and provide for its repayment. It is true, that there is no covenant on the part of the debtor for repayment, but still this is not sufficient to take away from the deed its distinctive character, namely, that of a security for an antecedent loan. [They cited *Lingon v. Foley* (1), *Baines v. Dixon* (2), and *Allan v. Backhouse* (3).]

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Mr. O'Hara, for the defendant, Porter.

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THE LORD CHANCELLOR :

There does not appear to me to be any serious difficulty in this case. Emerson being indebted to the plaintiffs in the sum of 400*l.*, and being entitled to an estate for life in certain leaseholds, and being also possessed of a policy of insurance for 500*l.*, secured the debt in the following manner: he conveyed the leaseholds to a trustee, upon trust, out of the interest, proceeds, or annual rent thereof, to pay the head-rent payable out of the said premises, and also the premium of insurance on the life of the said John Emerson,

(1) 2 Ch. Ca. 205.

(2) 1 Ves. Sen. 41.

(3) 13 R. R. 23 (2 V. & B. 65; Jac.

631).

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insured with the Eagle Insurance Company for the sum of 500*l.*, and also to pay over to the said Christopher and William Taylor the said sum of 400*l.*, with legal interest from the day of the date thereof, at the rate of 6*l.* by the year for every year, until the same should be paid off and discharged, and after payment thereof, then to reconvey to Emerson. Now, according to the authorities, I am to spell out the intention of the deed, and to endeavour to ascertain whether “rents and profits” mean the whole interest, or only the annual rents and profits. I think that the parties referred to the latter, namely, the annual rents and profits. The words are, “the interest, proceeds, or annual rent.” The first trust, in discharge of which the rents were to be applied, was to pay the head-rent; that was an annual outgoing. The next was the premium upon the policy of insurance; that, in like manner, was clearly to be paid out of the annual rents. There is no pretence for saying, that it was intended that either of these payments should be raised by sale or mortgage. Why, then, should there be any distinction as to the third object, which is the payment of the principal and the interest of the debt; there was but one general trust intended for all the purposes, and that must be administered in the same manner with regard to *all; and consequently, I think, there is no ground for contending that the plaintiffs, as mortgagees, are entitled to a sale.

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Now the policy of insurance, which was for 500*l.*, and was assigned by a separate deed, shows distinctly the groundwork of the arrangement: for under the deed assigning the leaseholds a fund was provided to meet the premiums, and on the dropping of the life, there would be a sum of money arising from the insurance, which would be more than sufficient to discharge the principal sum. I think, therefore, that the parties did not intend that the amount of this debt should be raised by a sale of the leaseholds; all that the plaintiffs are entitled to is, that the trustee, Porter, should enter into possession, or that the receiver already appointed should be continued. I shall direct the trusts of the deed to be carried into execution, under the direction of the Court, and declare that the parties are not to be considered as mortgagees, or entitled to a sale. Let the receiver be continued; and there should be liberty to all parties to apply.

Decree the trusts of the deed bearing date the 21st of November, 1837, to be carried into execution under the direction of this Court.

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EMERSON.

Declare that the plaintiffs are not entitled, as mortgagees, to have a sale of the lands and premises. Let the receiver be continued, and let him pay his balances from time to time to the plaintiffs, in liquidation of their demand and interest. Liberty to plaintiffs to apply to the Court, as there may be occasion. Costs to be paid out of the funds to be received by the receiver.—Reg. Lib. 87, fol. 310, 1843.

KIMBERLY v. TEW (1).

(4 Dr. & War. 139—153; S. C. 5 Ir. Eq. R. 389; 2 C. & L. 366.)

1843.
April 29.
—
SIR EDWARD
SUGDEN,
L.C.
[139]

A testatrix bequeathed a sum of 300*l.* to her executors, in trust to place the same out at interest, and pay same, as it should fall due, to her nephew for life, and at his decease, “to divide the said sum, and any interest, which might be due thereon, among all his children equally; and if he should leave but one, then to give the whole to said one child.” There were two children of the nephew, both of whom died in his lifetime:

Held, that this was a gift to the father for life, with remainder to the children as tenants in common, with a gift over, in case there should be but one surviving child, to that child; and that as that event had not happened, the representative of the deceased children was entitled to the fund.

In this case, a particular fund, which had been set apart during the life of the tenant for life to answer the bequest, having risen in value, the Court held, that there had been such an appropriation of that fund in payment of the legacy, as to entitle the party, to whom the legacy was now payable, to the benefit of the increase.

THE questions in this case arose upon the wills of Bellew Kyan and Catherine Kyan.

By the will of Bellew Kyan, which bore date the 14th of April, 1794, the testatrix, after giving certain directions with regard to her funeral, and the payment of her debts, bequeathed as follows: “I give and bequeath the remainder of my said property and personal estate, to my dear sister Catherine, for and during her natural life, and after her decease I hereby dispose of the same in manner following, to wit: I give and bequeath unto my nephew, James Kyan, should he be then living, the sum of 25*l.* sterling, and if he should be then dead, then I give and bequeath the same to his child or children (if more than one), as may be then living. I give and bequeath unto my executors, hereinafter named, the sum of 300*l.* sterling, in trust to place the same out at interest, but without risk to themselves, and pay the interest of the same, as it shall fall due, to my nephew, for and during his natural life; and after his death, to divide the said sum, and any interest that may

(1) *White v. Hill* (1867) L. R. 4 Eq. (1875) L. R. 10 Ch. 559, n., 44 L. J. Ch. 265, 16 L. T. 821; *Jeyes v. Savage* 706, 33 L. T. 139.

be due thereon at his death, among all his children equally, and if he leave but one child, then to give the whole 300*l.* to said one child."

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The testatrix then bequeathed a number of pecuniary legacies to various persons, to be paid upon the decease of her sister Catherine, the tenant for life; and gave all the residue of her effects to the Rev. William Tew and Mr. Paul Twigg, and appointed these last-named persons to be her executors.

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Catherine Kyan, the sister of the testatrix, on the same day made her will, in precisely the same terms as that already stated, except so far as that of substituting the name of her sister Bellew Kyan in the place of her own, as legatee of the entire property for her life; and she appointed the same persons, William Tew and Paul Twigg, to be her executors.

Bellew Kyan departed this life previous to the year 1800, leaving her sister Catherine her surviving; and the executors, Tew and Twigg, having renounced, administration with the will annexed was granted to Catherine Kyan.

In 1800, Catherine Kyan died, and her will was duly proved by the executors, Tew and Twigg. James Kyan was stated to have had two children only, both of whom survived the two testatrices, but died in the life-time of their father, who, upon their deaths, obtained letters of administration to be granted to him.

It appeared in the cause, that after the death of Catherine Kyan, the executors set apart seven Wide Street debentures of 100*l.* each (whether these debentures formed a portion of the assets of the testatrices, or whether they were purchased subsequently to their deaths, did not appear), in discharge of the two sums of 300*l.* bequeathed by the two *wills to James Kyan and his children, and subsequently paid the interest thereon to the said James Kyan, until the year 1825, when the said debentures were paid off; and the amount was thereupon invested by Tew, who was the surviving executor, in the purchase of 736*l.* 7*s.* 2*d.* Government old Three and a half per Cent. stock, the dividends upon which were regularly paid to James Kyan during his life by Tew, up to the period of his death, in 1830, and afterwards by his executrix, the defendant, Hester Tew.

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In the year 1842, James Kyan died, having by his will bequeathed the residue of his property to the plaintiffs, Frederick Kimberly and Charlotte Kimberly, and Frederick Kimberly having taken out administration *de bonis non* to the children of James Kyan, and

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also administration to James Kyan himself, the present bill [claiming a transfer of the stock] was filed by the plaintiffs, Frederick Kimberly and Charlotte Kimberly, his wife, against Hester Tew, the executrix of William Tew, [who claimed under the residuary bequests in the two wills.]

[142] The defendant further insisted, that the surplus of the stock, over and above what would be purchased with 600*l.*, constituted part of the personal estate of Catherine Kyan; that James Kyan was only entitled to the interest on the said sum of 600*l.*, and that consequently he had been overpaid during his life-time; and that the defendant ought now to be repaid out of any sum to which the plaintiffs, or either of them, might be declared entitled, the amount so overpaid.

It was not proved what was the precise value of the debentures, at the period of the death of Catherine Kyan; but it appeared that in the year 1800, they were much below par, and would not, if sold at that time, have produced the sum of 600*l.*

Mr. Serjeant Warren, Mr. Burroughs, and Mr. William O'Dell,
for the plaintiffs :

[143] * * The gift is absolute. The vesting in possession, it is true, is postponed to the happening of a particular event, the fall of the life of James Kyan. But this does not operate to render the gift contingent, or to prevent the vesting in interest. * * *

[144] *Mr. William Brooke, Mr. Barlow, and Mr. J. H. Smith,* for the
defendant :

The legacies in this case are plainly contingent. It is not alone the enjoyment that is postponed; the direction to pay or divide the legacies is the only gift, and that gift or distribution is deferred until the death of James Kyan. Time was annexed to the substance of the gift; and that gift could, therefore, only attach to such of the children as should be alive at the period of distribution.

[146] * * In *Barber v. Barber* (1), the rule is laid down clearly by Lord COTTENHAM; "if a testator give a legacy to be divided amongst the children of A., at a particular time, those who constitute the class at the time will take." * * At what time the debentures were purchased, cannot now be ascertained. James Kyan, it is true, was paid the full amount of the dividends: but this was an arrangement adopted for the convenience of all parties, and in

consequence of the smallness of the surplus dividends, and never could be held to amount to an appropriation of the fund.

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Mr. E. Burroughs, in reply. * * *

[Other cases cited by counsel are referred to in the following judgment:]

THE LORD CHANCELLOR [after observing that, according to the course of the Court, he must direct a reference to the Master to inquire and report as to the state of the family, proceeded as follows]:

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In the present case, though I am not at liberty to decide upon the questions that have been argued, yet it may be useful to state my present opinion, for the guidance of the parties. Upon the last point, I think there is no difficulty. There was clearly an appropriation of the fund, for the payment of the legacy. The consolidated sum, now in stock, appears to be a remnant of the estate, and no one could claim it adversely to the legatee, but the representative of the original testatrix. The debentures, when they were purchased, were at a depreciation. They subsequently rose in value, so that the sum produced by them, at the time they were paid off, amounted to more than the legacy. But as there was an appropriation of them to the payment of the legacy, and the legatees would have had to bear any loss, they are entitled, in my opinion, to the benefit of the increase in the value.

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As to the gift, it is in these words: "I give and bequeath unto my executors, hereinafter named, the sum of 300*l.* sterling, in trust to place the same out at interest, but without any risk to themselves, and pay the interest of the same, as it shall fall due, to my nephew, for and during his *natural life, and after his death to divide the said sum, and any interest that may be due thereon, at his death, among all his children equally; and if he leave but one child, then to give the whole 300*l.* to said one child." And the bequest of the second sum of 300*l.* in the other will, is in precisely the same words. Now the contest, in the present case, is not between a surviving child and the representatives of deceased children. In all cases like this of gifts to children, the Court is anxious to give vested interests to children who have died in their parents' life-time; for where a fund is left to a father for life, with remainder to his children, the children, looking to that fund as a future provision for their families, marry in the life-time of their

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father ; and the Court is unwilling that their children should be afterwards deprived of that provision by the accident of their death in their father's life-time.

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In the cases upon settlements, I refer to the cases of *Woodcock v. The Duke of Dorset* (1), *Schenck v. Legh* (2), and the various other cases which have occurred upon the same subject down to the present time, the Court, in furtherance of this principle, has struggled to read the word "leave" "have." In those cases the contest was between surviving children and the representatives of deceased children ; and the Court has always leaned to that construction, which would give vested interests to the children, and thus let in all the class, for whom it must have been the intention of the parties to the settlement to provide. I agree that it is not the same in the case of a will, because the intention to provide for the issue, who die in the parent's life-time, is not so strongly manifested, as in the case of a *settlement. But even there, the Court has struggled to give vested interests to the children. No doubt, the case of *Smith v. Vaughan*, cited from *Viner* (3), is a strong authority, it is almost identical with the present case ; but still I cannot go along with the reasoning of the learned Judge, Sir JOSEPH Jekyll, who decided that case. He is a very high authority, and I would not venture to differ from him without great hesitation. But still the case stands alone, and I do not remember to have ever heard it cited before. There the gift was of an annuity to trustees, in trust to pay the same to the testator's sister, for her life, and after her decease, to assign the same unto and for the use of all the children of her said sister, equally to be divided amongst them, and if she should leave but one child, then that they should assign all to that one child." There, as here, the tenant for life died, without leaving any child living at her death, but having had only one child, who died an infant, and the decision was, that the gift lapsed ; that it never vested, but was contingent during the mother's life, and that the time of her death was the time when the children were to take. The reasoning of the learned Judge was that the will showed clearly, that the testator intended his sister's children, if more than one, to take as tenants in common, and if but one at her death, then that that one should have all ; "whereas," he adds, "if this were to vest in the children, that might be in the mother's life-time, then it would follow, that their shares would go

(1) 13 R. R. 145, n. (3 Br. C. C. 569).

(2) 7 R. R. 199 (9 Ves. 300).

(3) Vin. Abr. tit. Devise (Z. c.)

pl. 32.

to their representatives, in case they died before the mother, when yet, if there was but one living at the death of the mother, that child was to have the whole;" and then he says, "there is no possible way to preserve a tenancy in common to all, and *yet the whole to go to one only child, that should survive the mother; and, therefore, as no child was to take, but such as was living at the death of the mother, and as in this case there was none, the remaining interest in the annuity was to be considered as undisposed of, and therefore to fall into the residue." Later Judges, however, have certainly not felt the same difficulty in executing what seemed to Sir JOSEPH JEKYLL to be so full of difficulty; and they have laid down rules, which seem to show that gifts to all the children, if there should be several, and if but one child should survive, to that only child, are perfectly consistent. The Court may give to all the children as tenants in common; and where there are several living at the period of the death of the father, that would be a clear execution of the very words of the will. Where then is the difficulty, if there be but one? Tenancy in common is then at an end, and that one child must take the whole, divesting the previous gifts. It appears to me that the true construction is, that the gift is to the father for life, with remainder to the children as tenants in common, if there should be several; but if the event should happen, and there should be but one child left, the previous gifts will be then divested, and the only surviving child will take all. It is said, that this is not consistent with the previous gifts, and it may not be, but it is quite as consistent as to give in this case the fund over, where there is no express gift over. I apprehend that the law of the Court is, that where there is a gift to one for life, with remainder to his children, that is a gift to all the children as a class. In the case in *Viner*, there never was but one child, and the case may have turned upon that fact.

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I do not feel the difficulty which struck Lord ALVANLEY, *in *Spencer v. Bullock* (1). It appears to me, that it is more easy to say, that he was speaking of children living at his own decease, than that he was referring to the death of the tenant for life, and that it is more consistent with the authorities. But I am quite warranted by law in construing this bequest as I do. Putting the

[*153]

(1) 2 Ves. Jr. 687. A case in which special circumstances which deprive the Judge, after some fluctuation of the case of practical application.—
O. A. S.

KIMBERLY
F.
TEW.

authorities out of the question, it appears to me, that the true construction of the bequest is, that it was a gift to the father for life, with remainder to the children as tenants in common, with a gift over, in case there should be but one surviving child, to that child. Then, as the event has not happened, the preceding gifts are undisturbed, and the representative of the deceased children is entitled to the fund. If I shall be sitting here when this case comes back, that is probably the way in which I shall decide it: at present I can only direct a reference to the Master.

1843.

May 3.

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L.C.
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WALSH *v.* STUDDART.

(4 Dr. & War. 159—173; S. C. 6 Ir. Eq. R. 161; 2 C. & L. 423.)

An executor's acquiescence in a voidable gift or other imperfect disposition of property by his testator is not to be inferred from the circumstance that the disposition has been treated as effectual in the executors' statement of accounts for the purpose of probate, or from the fact that the executors have delayed taking steps to set aside the disposition for a considerable time.

THE bill in this cause, which was filed by the Rev. Richard Walsh and Wyndham Patterson, as the executors of Francis Patterson, deceased, against the defendant Charles Studdart, stated that Francis Patterson was entitled to a small real estate, situate in the county of Clare, and that some years previous to his death he had become acquainted with the defendant, Studdart, who was a solicitor, carrying on business as such in partnership with one Robert Wogan, under the firm of Wogan & Co.; that Patterson, about the year 1824, employed Studdart as his land agent; and that his law business was conducted by the firm of Wogan & Co., as it had been for several years previously to Studdart becoming a partner of the firm.

The bill stated that the defendant, Studdart, continued to act as the land agent of Patterson up to the period of his death, at which time there was an open and unsettled account subsisting between them; that Patterson departed this life on the 3rd of July, 1831, having by his will, which was not dated, but was represented to have been executed some years previously, bequeathed one-third of his property to *the plaintiff, Wyndham Patterson, another third to one of his nieces, the wife of the plaintiff, Walsh, and the remaining third to another niece, the wife of Mr. James Otway, and appointed the plaintiffs Walsh and Patterson his executors, who accepted the office, and duly proved the will.

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The bill charged that the defendant, at the time of the death of Patterson, had in his hands a large sum of money, on account of the rents received by him, particularly from March and May, 1829, to the months of March and May, 1831, and for which he had never accounted, either with Patterson, or with the plaintiffs, as his executors, since his decease; and it sought a general account of all rents received by Studdart, as agent of Patterson, since the time an account was last stated and settled between said parties, and of the payments and disbursements fairly made by, and allowable to, the said defendant.

The defendant, Studdart, by his answer stated, that from the period of his appointment, in 1824, he from time to time settled accounts with Patterson, which were regularly signed by the latter, and paid over the balances appearing in his hands; that at the time of his appointment to the agency, there was a very considerable arrear returned due by the tenants, but that this was altogether reduced at the time, when the last account was furnished, in March, 1831, which included the half year's rent due March and May, 1829; that the sum of 85*l.* 15*s.* 2½*d.*, the balance appearing upon that account, was paid at the time to Patterson, but that the account was not then signed by Patterson, in consequence of some illness, under which he was suffering at the time.

The defendant by his answer stated, that Patterson, on the occasion of the last-mentioned settlement, in March, 1831, expressed great satisfaction with him, the defendant, for the manner in which he had acted in the conduct of his agency, none of the rents having been returned as lost, and there being no arrear due by any tenant, and that as he, the defendant, was shortly about to go to London upon some election petition, that he was anxious to show the sense he entertained of his services, by making him a present of 300*l.*, to enable him to purchase a carriage, or something else of value, for his wife; that at the same time he desired the defendant not to furnish any separate account for the year's rent of March and May, 1830, as the said sum of 300*l.* would more than absorb any balance that might be due thereon. The defendant then stated that he was not obliged to go to London, and that subsequently, Patterson having been suddenly taken ill, on the 2nd of July, 1831, the day before his death, sent for defendant, and again expressed his desire to give him said sum, and directed him to retain same out of the rents of the lands; that on leaving the bedroom in which said Patterson

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was, he stated both to his own brother, and to Patterson's house-keeper, who was much in his confidence, the directions given by Patterson in respect of the said sum of 300*l.*, and requested of them to express to Patterson how grateful he felt for his kind recollections of his services, at a time when he was so very ill; that Patterson rapidly became worse, so that there was no opportunity of speaking again to him upon the subject, and that in the course of that night, or on the following morning, he died.

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The defendant by his answer denied, that there existed any open or unsettled account between him and the said Francis Patterson, at the period of his death, save as to the *rents from March and May, 1829, to the corresponding months in the year 1831, which rents he admitted to have been subsequently received by him. He stated that an account was prepared by him of the personal estate of the testator, to enable the executors to furnish the inventory, and make the necessary declaration preparatory to proving the testator's will; that the account was dated the 19th of July, 1831, and that the inventory, which was in accordance therewith, was, after close investigation of the said account, verified by the joint affidavit of the plaintiffs; that the sum total of the rent returned for the two years ending March and May, 1831, after deducting head-rent and other outgoings, and agent's fees, amounted to 619*l.* 14*s.* 11*d.*, from which was deducted in said account the said sum of 300*l.*, and a further sum of 19*l.* 16*s.* 11*d.*, an allowance to a tenant; and that the balance of 305*l.* 18*s.* appearing upon the account, which was subsequently settled by the executors with the Stamp Office on or about the 2nd of August, 1831, was returned by the executors as the ascertained balance of rent due to the testator's personal estate at the time of his death.

The defendant further stated, that in the month of May, 1832, he furnished to the plaintiff, Patterson, at his request, an account of the rents received by him during the said two years ending March and May, 1831, and a specification of the several items of credit claimed as against said rents; that in said account the said credit of 300*l.* was claimed, upon the grounds which have been already stated; and that the balance was retained, to meet certain costs which had been incurred by the testator, Patterson, in his life-time, in a suit of *O'Reilly v. Patterson*, in the Court of Exchequer, and which were due to the defendant and his partner; that this *suit had been revived against the executors of Patterson after his decease, and that they had employed the

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defendant and his partner as their solicitors in the said cause, which was still undetermined, and the costs in which had not been as yet taxed or ascertained. The defendant stated that the plaintiffs never raised any objection to the account of May, 1832, and that one of them, Patterson, in a letter of the 23rd of April, 1833, referring to said last-mentioned account, and inquiring when said costs would be furnished, concluded with these words: "if the costs be not ready to be furnished, I hope you will make no objection to paying the amount of the account furnished me in Dublin this time last year, and the bill of costs can be settled hereafter." The defendant further stated, that it had been expressly agreed, that he should retain the balance of 305*l.* 18*s.*, towards the discharge of the costs in said cause, which were likely much to exceed the said balance. The defendant submitted that there was a clear case of acquiescence on the part of the plaintiffs, in the credit of 300*l.* claimed by the defendant; and with regard to the balance of the account, the defendant also relied upon the fact of the time, which had been permitted to elapse since the said balance was fully ascertained, and admitted, both in the accounts with the defendant and with the Stamp Office.

Upon the coming in of this answer, the plaintiffs filed an amended bill, disputing the right of the defendant to the 300*l.*, so claimed as a gift from the testator. * * *

Mr. James Dwyer, in the absence of *Mr. Pigot*, stated the case on the part of the plaintiffs. [164]

Mr. Serjeant Warren, *Mr. Moore*, and *Mr. Keller*, for the defendant. * * *

Mr. Pigot, in reply.

[The question as to the invalidity of the original gift needs no report, and the case is only retained here upon the question of the confirmation of the invalid gift by acquiescence.

After stating the facts and making some general observations, the LORD CHANCELLOR disposed of the former question by saying:]

I consider this conversation between Studdart and Patterson as a mere communication of the intention of Patterson to make the gift, but that it was not binding in any manner upon him. [172]

[Upon the question of confirmation by acquiescence the LORD CHANCELLOR continued as follows:]

Then, what acts have taken place, since the death of Patterson,

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to make it binding upon his executors? There are certain documents, relied on as showing that the executors considered that this money had been properly retained by Studdart. But those documents were made out before the year 1832, when the account of Studdart, apprizing them of the nature of the transaction, was furnished; and independently of that, I should be slow to hold that dealings by executors, with respect to the property of their testator, in the Ecclesiastical Court, in compliance with the provisions of a fiscal law, could give validity to transactions of this nature. In *Buckmaster v. Harrop* (1), payment of the auction duty was held not to be such a part performance as could take an agreement out of the Statute of Frauds, and enable the Court to decree a specific performance. Sir WILLIAM GRANT in that case said, "that the revenue laws ought never to be held to operate, beyond their direct and immediate purpose, to affect the property, and vary the rights of the parties." I cannot allow the necessity, which the executors were under, of paying the duty upon their testator's assets, to operate as a confirmation of transactions with a third party, which are open to impeachment; and I consider their right to object to this credit to be unaffected *by these documents. Then an account was rendered by Studdart to the executors, in which there was a statement of this transaction, which was perfectly fair, and I have no doubt that the transaction was an honest one on his part; and in that account, though he took credit in effect for this money, he did not claim it as a right. But if the transaction was not binding in 1832, as Studdart seems to have admitted by this account, how has it become binding since? The amount of the costs was not then ascertained, which might have been another reason why the executors did not then resist this claim: for, though they might not object to it, if the balance in Studdart's hands, after deducting that sum, would be sufficient to discharge the costs, yet they might very well resist the claim, if there was something to be paid by them in addition. Has anything occurred since that time to deprive them of their right to object to this credit? If any change had taken place in the situation of parties, if any damage had been occasioned by the delay, so as to place one party in a worse position than the other, there might have been a good reason for not now allowing the executors to dispute this sum. But nothing of that kind has been shown, and I am very clearly of opinion that Studdart had no right originally to retain this sum

against his client, and that nothing has since occurred to give him any such right as against the executors. There must be a declaration, therefore, that Studdart is not entitled to the sum of 900*l*. I shall give no costs of the suit, because I believe the defence to be an honest one, and that the transaction was perfectly fair on the part of Studdart; and that, though there was nothing like acquiescence in point of law, there was enough to lead Studdart to believe, and I have no doubt that he did believe, that the executors intended to acquiesce in the donation.

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GARNETT v. ARMSTRONG (1).

(4 Dr. & War. 182—198; S. C. 5 Ir. Eq. R. 533; 2 C. & L. 449.)

A. being entitled to the freehold lands of Blackacre and Whiteacre, in 1806 granted the former in mortgage, to secure an advance of 1,000*l*., and at the same time executed a collateral bond, upon which judgment was duly obtained, in Easter Term, 1806. This judgment was not revived until 1839, and was never redocketed under the 9 Geo. IV. c. 35 (2). In 1829, A. granted to B. an annuity of 400*l*., charged upon Whiteacre, and in 1833 died, having devised Whiteacre, subject to an annuity, to his wife, and all his other property to two trustees, upon trust to sell, and, after payment of his debts, to make an equal distribution thereof among his younger children. One of the trustees died in his life-time, and the other refused to act. In 1834, there being a considerable arrear of head-rent due upon Whiteacre, and the head landlord having brought an ejectment, B. paid off the arrear of rent, and the costs of the ejectment, and subsequently entered into a contract with the younger children for the purchase of Whiteacre, but died before completion; his widow and executrix, the principal defendant, however, afterwards adopted the contract, and by a deed of the 29th of February, 1840, Whiteacre was conveyed by the younger children to the defendant, *habendum* to her, her heirs and assigns, free from all incumbrances, except three judgments, one of which was the judgment of 1,000*l*. above mentioned, and the annuity of 400*l*. The covenant in the deed against incumbrances, however, was general. The surviving trustee of the will, though named a party in the deed, never executed it. On a bill filed by the plaintiff, who was entitled to the mortgage of 1806, and the judgment collateral, alleging that Blackacre was insufficient, and seeking to make good the deficiency, by means of the judgment, out of Whiteacre Held, that as the sale of Whiteacre was by the younger children, it was only the residue after payment of the debts that was sold, and that, consequently, the lands in the possession of the defendant were, notwithstanding the provisions of the statute 9 Geo. IV. c. 35, liable to the judgment.

Held, also, that the sum paid by B. in his life-time, in discharge of the arrears of head-rent, could not be set up as a charge ranking in priority to the plaintiff, but that it had in fact become extinguished in the inheritance.

By indenture bearing date the 27th of July, 1795, and executed in contemplation of the marriage of Henry Garnett and Alicia Cope,

(1) *Adams v. Angell* (1876) 5 Ch. D. (2) Rep. S. L. R. Aet, 1891.
634, 46 L. J. Ch. 352, 36 L. T. 334.

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reciting, that the said Alicia Cope was entitled, upon the death of her mother, to a sum of 1,000*l.*, secured by a deed of mortgage of the 3rd of February, 1775, it was covenanted, that immediately upon the decease of Elizabeth Cope, the said sum of 1,000*l.* should be assigned to the trustees of the settlement (Edmund R. Cope and St. George Ryder), upon trust, to permit the said Henry Garnett to receive the interest for his life, and after his death, subject, together with certain lands, to the making good a jointure for the said Alicia Cope, in case she should survive her intended husband, upon trust for the eldest son of the marriage, upon his attaining the age of twenty-one years.

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Shortly after the death of Elizabeth Cope, which occurred in the year 1805, this sum of 1,000*l.* was paid to *Edmund R. Cope, the surviving trustee; and he lent this sum to Henry Garnett, upon the security of a mortgage of certain lands called Grange Trevitt and Black Hills, situate in the county of Meath, the former of which was held by Garnett, under a lease of the 14th of July, 1796, for three lives, with a covenant for the perpetual renewal thereof, and the latter under a lease of the 1st of November, 1803, for three lives; the mortgage deed bore date the 16th of May, 1806; and as a collateral security therewith, Henry Garnett executed to Edmund R. Cope a bond in the penal sum of 2,000*l.*, with warrant of attorney for confessing judgment thereon; and in Easter Term, 1806, judgment was entered up against Garnett. This judgment was subsequently revived in 1839, but was never redocketed.

Upon the death of his father, in 1820, Henry Garnett became entitled, *quasi* in fee, to the lands of Tymoole, which were held under a lease of the 18th of July, 1801, for three lives, with covenant for perpetual renewal; and having contracted with William Jones Armstrong, for the grant of an annuity, by deed of the 23rd of March, 1829, and made between the said Henry Garnett, of the first part, William Jones Armstrong, of the second part, and the Rev. John Kerr, of the third part, the said Henry Garnett, in consideration of the sum of 4,000*l.* granted to William Jones Armstrong, his executors, administrators, and assigns, an annuity of 400*l.* charged upon the said lands of Tymoole, and certain other denominations, in which the said Henry Garnett had but a life estate, for the term of ninety-nine years, if the said William Jones Armstrong, Thomas Knox Armstrong, or Archibald Kerr, or any of them, should so long live; and by this deed the lands were demised to the said John Kerr for the term of 100 years, for the

purpose *of better securing the said annuity. By a subsequent deed of the 23rd of May, 1830, William Jones Armstrong declared himself to be a trustee of the annuity for Thomas Knox Armstrong.

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In 1833, Henry Garnett died, and by his will, which bore date the 24th of August, 1826, he devised the lands of Tymoole, and the equity of redemption in the lands of Grange Trevitt, to Robert Richards and Henry Cope Sweeny, and the survivor of them, and the heirs of such survivor, upon trust to pay an annuity of 100*l.* per annum, out of the lands of Tymoole, to his widow Alicia Garnett, in addition to the jointure provided by the settlement of the 27th of July, 1795; and he directed the said trustees, as soon as possible after his decease, to sell his interest in the said property, subject to the said annuity; and also all other property, both real and personal, and after paying all his just debts, to make an equal distribution thereof amongst his younger children; and he directed that if any of them should die before attaining the age of twenty-one years, that the share of such child should go to the survivors; and he nominated the said trustees, Robert Richards and Henry Cope Sweeny, to be his executors. Richards died in the lifetime of the testator, and Sweeny refused to act.

The testator had been for some time previous to his death in embarrassed circumstances. The head-rent of the lands of Black Hills (which was comprised in the mortgage of 1806), had been permitted to fall into arrear, in consequence of which the interest in the lease, under which these lands were held, was evicted, in 1832, for non-payment of rent. At the time of the purchase of the annuity, in 1829, there was also a considerable sum due for head-rent out of the *lands of Tymoole. This, however, was discharged out of the purchase-money for the annuity: but it appeared that the rent was again suffered to fall into arrear; and in 1834, there being then two years and a half rent due out of these lands, and the head landlord having recovered in an ejectment for non-payment of rent, Armstrong, the annuitant, came forward and paid a sum of 862*l.* 10*s.* for rent and costs, in order to redeem the same.

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In January, 1840, Thomas Knox Armstrong died, having by his will appointed, as his executrix, his widow, Catherine Frances Armstrong, the principal defendant in the cause. It appeared that shortly before his death, he had entered into an arrangement with the widow and younger children of Henry Garnett, for the purchase of the lands of Tymoole; but the same not having been completed during his life, was, upon his decease, adopted by his widow, and

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carried into execution by a deed of the 29th of February, 1840. This deed was made between the younger children of Henry Garnett, and the husbands of such of them as were daughters, of the first part; Alicia Garnett (widow of said Henry Garnett) of the second part; Henry Cope Sweeny, the surviving trustee in Henry Garnett's will, of the third part; and Catherine Frances Armstrong, of the fourth part; and after reciting, *inter alia*, the grant of the annuity of 400*l.* by the deed of the 23rd of March, 1829, the death of Henry Garnett, and his will, whereby, subject to the charges created by him, he gave and devised all his interest in the lands of Tymoole to his younger children, in equal shares, with benefit of survivorship: and after further reciting the death of Thomas K. Armstrong, and the agreement between him in his life-time and the younger children, for the purchase of said lands, at or for the price of 500*l.* sterling, *subject to the said annuity so granted as aforesaid; and after reciting further the death of Robert Richards, one of the trustees named in the will of Henry Garnett, and that neither the said Robert Richards, nor the said Henry Cope Sweeny had accepted the trust, but wholly repudiated same, and that the said Henry Cope did still disclaim same, but, nevertheless, that he had, at the special instance and request of the parties beneficially interested, consented to join in making title by executing the said deed, it witnessed, that in performance of said agreement, and in consideration of 500*l.*, the parties thereto of the first and third parts, according to their several and respective interests, granted and released the said lands of Tymoole, unto the said Catherine Frances Armstrong, and her heirs and assigns, to hold for the lives of the several cestuis que vie, in the last renewal named and for the lives of such other persons as should for ever thereafter be added to the term granted by said original indenture of lease of the 18th of July, 1807, by virtue of the covenant for perpetual renewal therein contained, "freed and discharged of and from all charges, judgments, and incumbrances whatsoever, heretofore created by the said Henry Garnett, save and except a judgment obtained against the said Henry Garnett, in her (1) Majesty's Court of Queen's (1) Bench, in Easter Term, 1806, in the penal sum of 2,000*l.*, and also two other judgments obtained against the said Henry Garnett in the Court of Exchequer, for the sums of 66*l.* 15*s.* 9*d.*, and 45*l.* 9*s.* 9*d.*, and the hereinbefore recited annuity of the 23rd of March, 1829, and save and except the payment of

(1) *Sic.*

the rent and performance of the covenants in said indenture of lease of the 18th of July, 1801, on the tenant or lessee's part, mentioned or contained." The deed contained a covenant, on the part of the younger children, with Catherine F. Armstrong, for quiet enjoyment by her of the *lands "conveyed, free and clear, and freely and clearly, and absolutely discharged and exonerated, or by and at the expense of (the grantors of the first part), their heirs, executors, or administrators, effectually defended, protected, indemnified, and saved harmless, of, from, and against all former and other gifts, grants, bargains, sales, mortgages, judgments, estates, titles, troubles, charges, debts, liens, and incumbrances, whatsoever, executed, committed, occasioned, or suffered by the said Henry Garnett," or by the said younger children, "or by Alicia Garnett, widow, or any of them, or by any person or persons claiming" by, under, or in trust for them, or any of them.

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The deed was not executed by the trustee, Henry Cope Sweeny.

The plaintiff in the present cause was Samuel Garnett, the eldest son of Henry Garnett, claiming to be entitled to the sum of 1,000*l.*, the subject of the settlement of 1795, and which had been lent to his father upon the security of the mortgage of the 16th of May, 1806, and alleging that the lands of Grange Trevitt (which alone remained, those of Black Hills having been evicted, as before stated), were a deficient security, he filed his bill on foot of the mortgage, and judgment collateral, for the purpose of having such deficiency made good out of the lands of Tymoole.

The bill prayed for an account, both on foot of the mortgage and judgment, and a sale of the lands of Grange Trevitt, and also of the lands of Tymoole, subject to the annuity of 400*l.*, charged thereon by the deed of the 23rd of March, 1829; and that what should remain due after the application of the produce of the lands of Grange Trevitt *should be paid out of the monies to arise by the sale of the lands of Tymoole.

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The defendant, Catherine Frances Armstrong, by her answer, admitted that her solicitor had notice of the plaintiff's judgment previous to the year 1835, but stated that this judgment had never been redocketed, and was not revived until the year 1839, and that it was then revived, without notice to any of the parties entitled to the annuity; and she insisted, that under the provisions of the 9 Geo. IV. c. 35, the said lands were not now liable to the payment of the said judgment. The defendant further alleged, that she, in her character of executrix of her husband, Thomas K.

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Armstrong, was entitled to a lien upon the lands of Tymoole for the sum of 862*l.* 10*s.*, which had been paid by him in his life-time, in redemption of those very lands, when under ejectment for non-payment of rent, in 1834; and she submitted that same was the first charge upon the said lands of Tymoole, and was payable thereout in preference to any other, save and except the accruing head-rents.

Mr. Serjeant Keatinge, Mr. Moore, and Mr. Franks, for the plaintiff. * * *

[189] *Mr. Serjeant Warren, Mr. Wm. Brooke, and Mr. Henry Ormsby, for the defendant, Catherine F. Armstrong.* * * *

[192] THE LORD CHANCELLOR:

In this case a sum of 1,000*l.*, which formed the marriage portion of the wife of Henry Garnett, and was vested in trustees, upon trust for the eldest son of the marriage, subject to the life interest of the father, was lent to Mr. Garnett by the trustees, upon the security of a mortgage and judgment collateral; the money was received by the father, and it constituted a debt of his at the period of his death, for which his assets are liable. Subsequently to this transaction, the lands of Tymoole, the estate now sought to be affected by this judgment, became vested in Henry Garnett absolutely; and he, in the year 1829, conveyed them to secure an annuity of 400*l.* to Mr. Armstrong; and by his will he devised them, of course subject to that annuity, and subject also to an annuity which he gave by the will to his widow, to trustees, upon trust for the payment of his debts; and subject to that trust, he gave the residue to his younger children. These lands of Tymoole were afterwards sold, but not by the trustees; because, although one of them was a party to the conveyance by which the fee was conveyed to the purchaser, he did not execute the deed, and it is recited on the face of the deed, that neither of the trustees had

[*193] *accepted the trusts, but that they had both disclaimed; the sale, therefore, was by the cestui que trusts alone; that is, by the younger children.

The deed of conveyance was made between the younger children of Henry Garnett, of the first part; his widow, of the second part; the surviving trustee of his will, of the third part; and the defendant, Catherine F. Armstrong, of the fourth part. It recited the annuity of 400*l.*, and the will of Henry Garnett; that a contract

had been entered into by the younger children of Garnett, for the sale of the estate to Mr. Armstrong (who is now represented by the defendant), subject to the annuity, for a sum of 500*l.*, and the death of Armstrong; the younger children then convey the estate, free from all incumbrances, except two judgments, which are not the subject of discussion here, and the judgment now in question, by which the 1,000*l.* was secured. It is truly said, that there is no recital that the estate was to be sold, subject to this judgment; on the contrary, the agreement for the sale, as recited, is for a conveyance, subject only to the annuity; and the covenants for title are against all incumbrances whatsoever, not excepting this judgment.

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The plaintiff, the owner of the mortgage and judgment, has filed the present bill, seeking to raise out of the lands conveyed to the defendant, Armstrong, so much of the judgment as the lands comprised in the mortgage shall be found insufficient to cover. This judgment, not having been revived or redocketed within five years after the passing of Moore's Act (1), was void both at law and in equity *against the purchaser. That I do not understand to be disputed; but the plaintiff's case is, that the purchase was made expressly subject to this judgment. On the part of the defendant, it is insisted, first, that the plaintiff is not entitled to come in under the conveyance, as an incumbrancer, whose security, though void at law, is saved by the express terms of the deed, for though, in the conveyance, the estate is stated to be subject to this judgment, yet it was not intended to make the estate liable to the judgment: that the covenant against incumbrances is general, and contains no exception in favour of this judgment, and therefore there is no contract respecting it; but that if, in consequence of the form of the conveyance, it should be held, upon the true construction of the deed, that there was a contract on the part of the defendant, to pay this judgment, yet the authorities are against the right of the plaintiff to enforce the payment in the present mode of proceeding. Secondly, it has been insisted that the defendant is a purchaser for value, and that though there was notice of this judgment, yet that is immaterial, because the statute renders the judgment actually void against the purchaser, as it was not revived or redocketed within the proper time.

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With regard to the first point, the case stands thus: here is an existing debt, secured by a judgment; that judgment has been revived within twenty years, and is therefore good against the

(1) 9 Geo. IV. c. 35.

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debtor and his assets, though, as against the purchaser, it has been rendered void by the provisions of Moore's Act. As a judgment, therefore, it did not bind the estate in the hands of the purchaser, but the seller has thought proper to convey the estate, subject to it. It appears to me, that the true construction of the contract is, that

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the debt was to be paid ; and that, as between the purchaser *and the judgment creditor, the estate was to be subject to it ; but that the seller agreed to indemnify the purchaser, and to throw it on the other assets of the testator, though, in the first instance, the purchase was to be subject to the claims of the judgment creditor.

The case of *Thomas v. Pledwell* (1), cited from Viner, takes up the second point thus. The judgment there did not affect the purchaser, but he had notice of it, and an allowance was made for it in the purchase money. Lord MACCLESFIELD said, " it is plain the defendant had notice of the judgment, and did not pay the value of the estate, and that is a strong presumption of an agreement to pay off the judgment, and since the plaintiff cannot proceed at law against the land upon the judgment, for want of docketing in due time, he ought to be relieved in a court of equity ; " and he decreed the defendant to pay the money *bonâ fide* due upon the judgment. I am not aware of any authority against this. I do not consider the case of *Skeeles v. Shearly* (2) as opposed to it. There, by the operation of a deed of appointment, the judgment was overreached, and had ceased to be any lien on the lands ; but it was said, that a sum of 1,000*l.* was retained to pay off the judgment, and, therefore, the mortgagee took, subject to it. But what was the real contract ? It was to vest the estate in the purchaser, discharged from the claim of every body. The parties meant to exclude the judgment creditor ; but as they were not sure that the law would enable them to do so, they left 1,000*l.* to pay off the judgment, if it were a lien, but only in that event, and so far from creating a trust for the

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judgment *creditor, or giving him any lien against the estate, they meant to exclude him, and to retain the money. When the case came before Lord COTTENHAM, he said, " as to the second point, if the plaintiff has no lien upon the estate, created by the appointment, the alleged notice is immaterial ; but it seems to have been supposed, by the bill, that a species of trust was created in the plaintiff's favour as to the 1,000*l.* For this there is no pretence. The plaintiff was no party to the transaction, and the whole 4,500*l.*

(1) Vin. Abr. tit. Creditor and Debtor (E.) pl. 5. (2) 42 R. R. 141 (3 My. & Cr. 112).

is proved to have been paid by Shearly, 3,500*l.* to the prior mortgagees, and 1,000*l.* to the solicitor of Cook. It is quite immaterial, whether it was the object of borrowing that sum, that the plaintiff's debt should be paid with it. There was nothing in the transaction to give him a lien upon the property, in preference to the mortgage of Shearly."

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Now Cook was the mortgagor, and his solicitor was not the solicitor of the mortgagee; when, therefore, the 1,000*l.* was paid to him, the whole money had come to the right hand, and the evidence showed that the amount intended to be advanced, had been paid to the prior incumbrancer and the mortgagor; even in the hands of the mortgagor, it would be liable to indemnify the mortgagee, in the event of the judgment creditor establishing his demand. That authority does not appear to me to touch this case. I am disposed to say, that if the case here was, that there was an existing debt, which could bind the estate, not strictly as a judgment, but as a debt, and that the agreement between the parties was, that the purchaser should take the estate subject to it, there would be no doubt the purchaser would be obliged to fulfil his obligation, and to pay the amount of the judgment, although the judgment might be barred as a judgment. If the parties thought fit to say, this *is the part of the assets on which the debt is to be thrown, the purchaser, being a party, would be bound. I am, however, relieved from deciding that point in this case, for there is a point, which the counsel for the defendant, though they argued the case very ably, wisely refrained from touching, and it is this. The property was devised to trustees, upon trust to sell and to pay the debts of the testator, and to divide the residue among the younger children. The younger children alone, without the trustees, sold, and of course they sold nothing but the residue, that is, the estate subject to the debts. Now this judgment is one of the debts provided for by the trust, and therefore it is an incumbrance on the property, which none of them had the power of displacing. I have looked at the conveyance to see how the will was recited, and I find that the trust in the will to sell and pay the debts is not recited; but the parties recite that Henry Garnett died about the 23rd of April, 1833, that previously thereto he made his will, by which he, subject to the charges created by him, devised all his interest in the lands of Tymoolo to his younger children, in equal shares, with benefit of survivorship. That is a false recital. But if the parties had stated the facts correctly, it would have appeared on the face of the

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conveyance that they had no title. It appears to me that the decree is quite of course.

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There is still another point. The defendant says, that she is entitled to a sum of money, which was paid by Armstrong in his life-time in discharge of head-rent, and that the plaintiff is not entitled to deprive her of the benefit of the payment, although the Court should construe the deed of conveyance to her, as recognizing the judgment. This has been argued by the counsel for the defendant, who has *spoken last, but I apprehend that the law is otherwise. The cases upon the subject, particularly the case of *Parry v. Wright* (1), decide that if one buy an estate, upon which he has an incumbrance, and do not keep the incumbrance on foot, a puisne incumbrance will be let in at his expense, and he will lose the benefit of his prior incumbrance, and be considered as the owner of the estate, subject to the puisne incumbrance. I apprehend that the right to this payment cannot now be set up against the plaintiff, but that it has become extinguished in the inheritance. It appears to me that the decree is almost a matter of course.

MILLIKEN v. KIDD.

(4 Dr. & War. 274—283; S. C. 5 Ir. Eq. R. 396; 2 C. & L. 442.)

1843.
May 29, 30.
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Upon the purchase of an annuity granted for two lives and the life of the survivor, and made redeemable upon six months' notice, a policy of insurance, which had been effected upon the life of one of the grantors, was assigned to the annuitant, and was subsequently kept up by her at her own expense. The life having dropped, the Company paid the amount of the insurance to the annuitant. The annuity having subsequently fallen into arrear, upon a bill filed by the annuitant to raise the arrears: Held, that the annuitant was not bound to give credit for the amount received on foot of the policy, as against the arrears of the annuity; but was entitled to retain the same as compensation for the diminution in value of the annuity.

By indenture, bearing date the 28th of February, 1835, and made between Richard Kidd, of the first part; George Kidd, of the second part; John Douglass Johnstone, of the third part; and William O'Beirne, of the fourth part; after reciting the title of Richard Kidd and George Kidd to certain premises therein set forth, and that by indenture, bearing date the 10th of April, 1833, the said Richard Kidd had, in consideration of the sum of 460*l.*, granted to the said John D. Johnstone an annuity of 6*l.* for the life of the said George Kidd: and that by a further deed of the 15th of January, 1834, Richard Kidd and George Kidd had granted unto the said

John D. Johnstone an annuity of 38*l.* per annum, in addition to the former annuity of 61*l.*, to be paid during the lives of the said Richard and George Kidd: and after further reciting an agreement that Richard Kidd and George Kidd should grant an additional annuity of 6*l.*: it was witnessed, that in pursuance of said agreement, and for the considerations therein mentioned, the said Richard Kidd and George Kidd did grant unto the said John D. Johnstone the three said several annuities of 61*l.*, 38*l.*, and 6*l.*, amounting in the whole to the sum of 100*l.*, for the lives of the said Richard Kidd and George Kidd, and the survivor of them; and thereby covenanted to pay said annuities for and during the term for which same were granted. And the said deed further witnessed, that for the better securing the payment of the said annuities, the said Richard Kidd and George Kidd demised unto the said William O'Beirne all the premises therein particularly mentioned, to hold for the term of ninety-nine years, *upon trust to receive the rents of said premises, and apply the same, in the first instance, in discharge of the head-rent of the premises, and then in payment of the said annuities, at the times and in the manner therein mentioned: and the deed contained a power of repurchase, on the part of Richard Kidd and George Kidd, upon giving six months' notice in writing to the said John D. Johnstone, of their intention so to do.

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By indenture of the 4th of January, 1836, John D. Johnstone, in consideration of 900*l.*, assigned said annuities to Mrs. Anne Milliken; and by the said deed, William O'Beirne, with the consent of Johnstone, assigned the said term of ninety-nine years to Andrew Milliken, in trust for the said Anne Milliken.

The bill in the present cause was filed on the 12th of April, 1842, by Mrs. Anne Milliken and her trustee, Andrew Milliken; it stated that Richard Kidd had died in the month of June, 1840, intestate, and without issue; that George Kidd, who was the only defendant, was still alive, and that there was an arrear due upon foot of the annuities, amounting to the sum of 120*l.* 3*s.* 1*d.*, up to the 25th of March, 1842.

The bill prayed, that the three several annuities, amounting in the whole to the sum of 100*l.*, might be decreed to be well charged upon the premises therein mentioned; that an account might be taken of what was due on foot of the said annuity, and for payment thereof, and for a receiver; and that such receiver might be decreed, out of the rents and profits, to pay the said arrears, and

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keep down the accruing *gales of the annuity, as the same might thereafter become due and payable.

The defendant, George Kidd, by his answer, stated that George Kidd, who was the father of the defendant, as well as of Richard Kidd, had by his will devised the premises, which were chargeable with the annuity, to Richard Kidd, for his life, and after his decease, in case of his dying unmarried, or without leaving a wife or child living at the time of his death, to the testator's surviving sons: that Richard Kidd, some time in the year 1830, applied to a Mr. Daniel Brady for an advance of 200*l.* upon an annuity charged upon the premises bequeathed by the will of his father, George Kidd, which Brady agreed to grant, but required an insurance for such sum, to be procured upon the life of said Richard Kidd; and that said insurance was accordingly effected in the name of Brady, but at the expense of Richard Kidd himself. The defendant further stated, that upon the occasion of the execution of the deed of the 10th of April, 1833, it was agreed that John D. Johnstone should retain, out of the consideration money for the annuity then granted by Richard Kidd to Johnstone, sufficient to pay off Brady; which he accordingly did, and obtained an assignment of said policy of insurance, by deed of the 13th of April, 1833, in part security for the sum advanced by him on foot of said annuity: that of the further sums, which were advanced by Johnstone to Richard Kidd, and which were secured by the deeds of January, 1834, and February, 1835, he, the defendant, George Kidd, had never received a shilling, and that he was a mere surety in the transaction for his brother, Richard Kidd: that upon the execution of the assignment of the 4th of January, 1836, the said policy of insurance was assigned *to the plaintiff, Anne Milliken, by a contemporaneous deed, and that upon or since the death of Richard Kidd, the said Anne Milliken had received the full amount of the policy from the Insurance Office: and the defendant submitted that the plaintiff, Anne Milliken, was bound to give credit for the amount thereof out of the sum which should be found to be due upon foot of the annuity.

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Mr. Serjeant Warren, Mr. Serjeant Keatinge, and Mr. Burroughs, for the plaintiffs:

There is no foundation for the equity which the defendant seeks to establish in this case. The annuitant was not under any obligation to keep up the insurance; but freely, of her own accord,

and at her own expense, she thought proper to maintain it; and she is, therefore, clearly entitled to reap the benefit of what was thus her voluntary act. * * *

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Mr. Corballis and Mr. Loughnane, for the defendant :

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The insurance in this case, which was originally effected on the occasion of the loan by Brady, was obtained at the expense of Richard Kidd himself; and upon the repayment of that loan, it became the absolute property of Richard Kidd; and though assigned by him to Johnstone, yet it was only as an additional security, to protect the annuitant; a mere contract of indemnity. [They cited *Phillips v. Eastwood* (1) and *Ex parte Andrews* (2).]

THE LORD CHANCELLOR :

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I must look through the deeds before I decide this point. I do not apprehend that there is any great difficulty in it. The case of *Phillips v. Eastwood* (1), as I recollect it, was an annuity transaction, which had been turned into a loan; and I considered the policy as one of the securities for the loan, and held that it was a debt due to the party who had lent the money. This is rather a singular transaction. Richard Kidd granted an annuity to Brady, in the common way, for his own life, and an insurance was effected upon his life, for the sum of 200*l*. Afterwards, Kidd re-purchased the annuity, and the policy was treated, both in the instrument securing the annuity, and also upon the redemption, as a mere security for the sum, for which the annuity had been granted, and it was accordingly transferred to Kidd himself. Now, in the ordinary course of business, when the grantee of an annuity, not being under any obligation to keep up an insurance upon the life of the grantor, does in point of fact insure, the policy belongs to the grantee, because he pays the premium, which, to that extent, diminishes the annuity. In this case, the policy appears to me to have been treated as a security for the annuity, or rather for the consideration money.

The transaction of 1838 followed, when Richard Kidd granted an annuity of 61*l*. to Mr. Johnstone, for the life of George Kidd, and on that occasion he assigned to Johnstone the policy of insurance on his own life for 200*l*., which, as I have already stated, had been transferred to him when he re-purchased the annuity

(1) 46 R. R. 226 (Ll. & G. t. Sugden, 270). (2) 16 R. R. 263 (1 Madd. 573)

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granted to Brady. My impression on the deeds is, that the policy was intended to be *a security for the consideration money, that is, for the return of the money ; but as there was no contract on the part of the grantee to keep up the policy, the question which now arises is, what is the effect of his having continued it? In 1835, there having been in the previous year another annuity of 33*l.* granted to the same Mr. Johnstone, for the lives of Richard and George Kidd, the annuities were increased to an annuity of 100*l.*, and consolidated so as to form one annuity for the lives of Richard and George Kidd, and the life of the survivor, and two policies of insurance for 700*l.* were effected upon the life of George Kidd. In 1836 this consolidated annuity and the policies of insurance were assigned to the plaintiff. In the year 1840 Richard Kidd died, and the plaintiff received from the Company the 200*l.* for which Richard's life had been insured. Now, it seems to have been forgotten in the argument, that upon that event the annuity was no longer of the same value as before. An annuity for one life, it is obvious, is not of the same value as an annuity for two lives ; and, therefore, though the 200*l.* has been received, though the plaintiff has got the fruit of the payments she has made on foot of the insurance, yet the annuity has been proportionably decreased in value. This annuity is now only an annuity for the life of the survivor. Redeemed it may be ; and if so it must be redeemed by one payment of the whole consideration. But redeemed it need not be ; for it is not compulsory upon the grantor to redeem it, and it is not probable that he will now do so, because the annuity is not now worth the original consideration money. I apprehend, therefore, that the annuitant will be entitled to retain the 200*l.*, as a compensation for the loss of the life. It is quite clear that the 200*l.* ought not to be applied in discharge of the arrears of the annuity. I cannot suppose *that the parties intended the policy to have been kept up for the purpose of paying arrears, which ought never to have been permitted to accrue. I cannot so decide unless such appear to be the contract of the parties. It is equally clear that it ought not to be applied to a partial redemption, because the annuitant is not bound to submit to a partial redemption. He is entitled to a complete redemption, or none at all. What, then, am I to do with this money ? I cannot give it to a person by whom the expense of the premium, properly speaking, was not defrayed, and take it away from the person who has sustained that expense. I consider that the time is not come for disposing of the 200*l.*, and

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that it will not have arrived until the grantor comes to redeem. If ever that time should come, and the grantor should seek a redemption, which must be an entire redemption, the question will properly arise, whether this 200*l.* is to form part of the consideration for the redemption. If the annuity should never be redeemed, the consequence of holding otherwise would be, that the annuitant would not get back his consideration money. The receipt by the plaintiff of the 200*l.* now is merely accidental. The life dropped, and the money became payable; but the annuity was damaged by so much. No doubt the annuity is still of the same amount, but it is not the same in point of future duration. If the annuity had been granted but for one life, and that life had been insured, there would be no doubt as to the plaintiff's right to the amount of the insurance. This, therefore, is but the payment of part of the re-purchase money in anticipation; and supposing the annuity is not redeemed, the plaintiff will, upon the fall of the surviving life, receive the entire consideration money, which, in the view I have taken, appears to me to have been intended to be the bargain between the parties. *The dropping of the life is merely accidental, and is, therefore, a circumstance over which the Court can have no control. The question, however, is of considerable importance, and I shall reserve my final judgment.

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THE LORD CHANCELLOR :

May 30.

I have read over the documents in this case, and adhere to the opinion I have already expressed.

It is, as I stated, rather a singular case, arising principally from the circumstance of there being two grantors. The annuity was for the lives of the two grantors, and for the life of the survivor. Insurances were effected upon their lives, sufficient to cover the consideration money: one for 200*l.*, upon the life of Richard Kidd, and two amounting to 700*l.*, upon the life of George, the other grantor. There is nothing, however, to distinguish this case from the common one of a life annuity, secured by means of an insurance upon the life of the grantor, the annuity being of such amount as to enable the grantee, in addition to interest, to keep up a policy of insurance, so as eventually to secure the repayment of the principal. In such a case, the grantee may either put the annuity wholly into his pocket, and thus become his own insurer, or effect an insurance, and thus secure the payment of the money at the death of the cestui que vie. Here the insurances were for different sums,

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and at different times. Nobody could have anticipated that the result would have been different from what it is. Nobody could have supposed that the two lives would fall at the same instant. One or other must, in the ordinary course of events, have *dropped first. That has occurred, which, from the nature of the transaction, must have been expected, that instead of the whole consideration money being paid at once, an instalment of it has been received. A portion has come to hand during the continuance of the annuity. The remainder will be paid when the annuity falls, at the death of the surviving cestui que vie. But I can do nothing with this money. The party received it in payment of a portion of the value of the annuity. What may be the effect of this state of things, in the case of a re-purchase of the annuity, I do not feel myself called upon to consider : and I desire to be understood as not deciding that point. All I decide is, that there is to be relief according to the prayer of the bill, and that the 200*l.* is not to be taken into the annuity account.

1843.

June 9.

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SUGDEN,
L. C.

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STACKPOOLE v. STACKPOOLE.

(4 Dr. & War. 320—353; S. C. 2 C. & L. 489; 6 Ir. Eq. R. 18.)

By indenture of marriage settlement, a power was given to the husband to appoint, by deed or will, the lands of Blackacre and Whiteacre, held under leases for lives renewable for ever, to any of the sons of the marriage, for any estate not exceeding an estate *quasi* in tail male. The husband made his will, and after reciting the power, in express execution thereof, devised the lands of Blackacre to a trustee to the use of his third son, M., for life, with remainder to trustees to preserve, &c., with remainder to the first and other sons of M., in succession; and in default of such issue remainder over to the testator's sixth son, N. :

Held, that the *cy près* doctrine may be applied to the execution of a power by will, and accordingly, that the will of the testator in this case operated as a good appointment of Blackacre to M., the third son, *quasi* in tail male.

A tenant for life in possession who is barred by the Statute of Limitations cannot claim a fresh right upon the subsequent accruer to himself of a contingent reversion or expectancy in the same property upon failure of the intermediate limitations of the settlement.

By indenture bearing date the 8th of October, 1767, and made between George Stackpoole of the first part; William Stackpoole and Matthias Finucane of the second part; and Andrew Lysaght and Jane Lysaght, his daughter, of the third part, being the settlement executed upon the intermarriage of George Stackpoole and Jane Lysaght, after reciting the will of Edmond Hogan, by

virtue of which George Stackpoole was seised for life of certain lands thereby devised, with remainder to his first and other sons *successively in tail, with power to charge the lands with a jointure, and with portions for younger children, it was witnessed, that in pursuance of the said powers George Stackpoole charged those lands with a jointure of 300*l.* per annum for Jane Lysaght, and with the sum of 3,500*l.* for the younger children of the intended marriage: and by the same indenture, after further reciting that Andrew Lysaght was then seised *quasi* in fee of the lands of Lahensy, Ardnakelly, Dough, Ballyvorda, Ballybyan and Ballyea, and also of the lands of Ballyfadeen, Moymore, and Knockersceagh, under certain leases for lives renewable for ever, it was further witnessed, that Andrew Lysaght conveyed the lands last mentioned to William Stackpoole and Matthias Finucane, and their heirs, upon trust, as to the lands of Lahensy, Ardnakelly, Dough, Ballyvorda, Ballybyan and Ballyea, to the use of George Stackpoole, his heirs and assigns for ever; and as to the lands of Ballyfadeen, Moymore, and Knockersceagh, to the use of Andrew Lysaght for life, without impeachment of waste, remainder to trustees to preserve, &c., remainder to the use of the sons of Andrew Lysaght, for such estates not exceeding estates tail as he should appoint, and in default of appointment to them successively in tail male; remainder to the use of the daughters of Andrew Lysaght (exclusive of the said Jane Lysaght) for such estates not exceeding estates tail, as he should appoint, and in default of appointment to them as tenants in common in tail, with remainder to George Stackpoole for life, remainder to trustees to preserve, &c., with remainder (subject to an additional jointure of 100*l.* per annum thereby provided for Jane Lysaght), “from and immediately after the decease of the said George Stackpoole, to the use and behoof of all and every, or such one or more of the sons of the body of the said George Stackpoole, *on the body of the said Jane Lysaght lawfully to be begotten, for such estate and estates not exceeding or larger than an estate or estates in tail male, and in such parts, shares, and proportions, manner and form, with or without power of revocation, as he, the said George Stackpoole at any time or times during his life, by any deed or deeds, writing or writings, under his hand and seal, attested by two or more credible witnesses, or by his last will and testament in writing, should direct, limit, give, or appoint the same; and in default, &c., to the use of the first” and other sons of George Stackpoole and Jane Lysaght, in tail male, with

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STACKPOOLE remainder to their daughters, with remainder to the right heirs of
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 STACKPOOLE. Andrew Lysaght for ever.

Andrew Lysaght died without having had any other child than Jane, and accordingly on his decease, George Stackpoole became entitled to the lands of Ballyfadeen, Moymore, and Knockersceagh for life, with the power of appointment above stated, and remainders over.

George Stackpoole had issue by his said wife Jane Lysaght, six sons, viz. : George, Andrew, Matthias, Hugh, William Henry, and Michael, and four daughters.

* * * * *

[324] George Stackpoole, the elder, made his will, dated the 28th of
 [325] April, 1811, [containing the following passage]: “ And whereas, by my marriage settlement I have power to appoint the lands of Ballyfadeen, Moymore, and Knockersceagh, in the barony of Corcomroe, in said county (which I hold under a lease for three lives, renewable for ever, made by the late Earl of Carrick, subject to the yearly rent of 122*l.*), to the use and for the benefit of such of my sons by my present wife as I should think fit, and to make such appointment by my last will, subject, however, to an annuity of 100*l.* for my said wife during her life, in case she shall survive me ; I now, therefore, in exercise of the power so vested in me as aforesaid, appoint, give, and devise the said lands of Ballyfadeen, Moymore, and Knockersceagh, to said Hugh, Lord Massy and his heirs, in trust, and to the several uses and purposes herein mentioned ; that is to say, the said lands of Ballyfadeen and
 [*326] Moymore (subject to 80*l.*, part *of said head rent of 122*l.*) to the use of my third son, Matthias Stackpoole, for and during his natural life, remainder to the said Hugh, Lord Massy and his heirs, in trust to support the contingent remainders hereinafter limited, from being barred or destroyed, and for that purpose to make entries and bring actions as the case may require ; but to permit the said Matthias Stackpoole to receive the rents and profits thereof, during his natural life ; and from and after the decease of the said Matthias Stackpoole, remainder of said lands of Ballyfadeen and Moymore, to the use of the first and every other son and sons of the body of the said Matthias Stackpoole, lawfully to be begotten, successively, as they shall be in seniority of age and priority of birth, the elder of such sons and the heirs male of his body always to be preferred, and to take before the younger and the heirs male of his body ; and for default of such issue,

remainder of said lands of Ballyfadeen and Moymore, together with the said lands of Knockersceagh (which I now hereby give, devise, and appoint, immediately after my death, subject to the payment of 42*l.*, part of said outgoing head rent of 122*l.*), to the use and behoof of my sixth son, Michael Stackpoole, for and during the term of his natural life." The testator then appointed the said lands of Ballyfadeen, Moymore, and Knockersceagh, to Hugh, Lord Massy, during the life of Michael Stackpoole, to preserve contingent remainders, and after the death of Michael Stackpoole to his first and other sons successively in tail male; and after the death of Michael Stackpoole, he gave similar remainders to William Henry Stackpoole and Andrew Stackpoole, and their first and other sons in tail successively, with remainder to his own right heirs.

The testator, George Stackpoole, the elder, afterwards *made a codicil to his said will, dated the 21st of November, 1811, and thereby [devised certain lands] "to my said son Michael, if he shall be living at the time of the death of my said son George, without issue male, and to the heirs male of the said Michael's body, lawfully issuing, in lieu and exchange for the lands of Knockersceagh, devised to him by my said will. And if my said son, Matthias Stackpoole, shall be living at the time of the said George's death, without issue male, as aforesaid, then I devise the said last-mentioned lands of Knockersceagh and Rannah, to the said Matthias and the heirs male of his body, lawfully issuing." * * *

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The said testator, George Stackpoole, the elder, afterwards added a second codicil, dated the 5th of September, 1812, which did not disturb in effect the dispositions and limitations made by his will and first codicil as above stated. Shortly afterwards, in the year 1813, the said testator died, without having altered or revoked his said will and codicils, and thereupon Matthias Stackpoole entered into possession of the lands of Moymore and Ballyfadeen. * * *

By indenture dated the 15th of September, 1815, made between Matthias Stackpoole of the first part, Thomas Pilkington of the second part, Ellen Pilkington of the third part, and trustees of the fourth and fifth parts, being the settlement executed upon the marriage of Matthias Stackpoole with Ellen Pilkington, after reciting that under a lease made in the year 1805, Matthias was seised of an estate for three lives, in part of the lands of Moymore and Ballyfadeen, and that his father, the said George Stackpoole the elder, had devised the lands of Moymore and Ballyfadeen to

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STACKPOOLE him for life, with remainder to his first and other sons ; and further
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 STACKPOOLE. reciting that under the same will Matthias would become, upon certain contingencies, entitled to the lands of Rannah and Knockersceagh, it was witnessed that Matthias Stackpoole limited the said lands of Moymore, Ballyfadeen, Rannah, and Knockersceagh, and all the right, title, and interest of the said Matthias therein, to the use of Matthias for life, remainder, subject to a jointure for his intended wife, to the first and other sons of the marriage successively in tail male, with remainder, as to the lands of Rannah and Knockersceagh, to the daughters of the marriage as tenants in common ; and as to the lands of Moymore and Ballyfadeen, to Michael Stackpoole for life, with remainder to his first and other sons, with similar limitations successively to William Henry Stackpoole, Hugh Stackpoole, and Andrew Stackpoole, the *other brothers of Matthias, and their respective sons, with an ultimate remainder to Matthias in fee : and by this deed Matthias, after reciting that in case he should become entitled to the lands of Rannah and Knockersceagh, he would be only seised of an estate tail therein, covenanted to levy fines and suffer recoveries to enure to the uses of this settlement.

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The marriage took effect, and there was issue two sons ; and Ellen Stackpoole, the wife, died sometime previously to the year 1827, leaving her husband, Matthias, her surviving.

By marriage articles, dated the 11th of June, 1827, executed upon the occasion of the intermarriage of Matthias Stackpoole and Louisa Mary M'Namara, after reciting that by the settlement of 1815, the lands of Moymore, Ballyfadeen, Rannah, and Knockersceagh, had been settled on Matthias Stackpoole for life, with remainder to his first and other sons by Ellen Pilkington, and that the said Matthias then had a life estate in said lands, with a reversion expectant upon the failure of his issue male by said Ellen Pilkington, the said Matthias Stackpoole covenanted that, in case of the decease of his sons by Ellen Pilkington without issue male, he would settle the lands of Moymore, Ballyfadeen, Rannah, and Knockersceagh to secure a jointure for his then intended wife, Louisa Mary M'Namara, and subject thereto, to the use of the first and other sons of the marriage successively in tail male, with remainder to the daughters of the marriage as tenants in common in fee.

There were issue of this marriage two daughters, Sarah Jane and Mary Louisa Stackpoole, the plaintiffs in the present cause.

Matthias Stackpoole died in 1835, and his sons, the issue male of his first marriage, died, one in 1834, the other in 1840, and both under age and without issue. STACKPOOLE
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George Stackpoole, the younger, died without issue in the year 1816, and the shifting limitations, which, under the will of George Stackpoole the elder, were contingent on that event, then took effect, and accordingly the estate tail of Michael Stackpoole in the lands of Knockersceagh ceased, and the lands became vested in Matthias and his issue. Michael Stackpoole, however, continued in possession of the lands of Knockersceagh. * * *

Renewals of the leases, under which the lands of Moymore, Ballyfadeen, Knockersceagh, and Rannah were held, pursuant to the covenants in those leases, were executed to Matthias and Michael Stackpoole, after the settlement of 1816, and the legal estate, which had vested in the trustees of that settlement, had determined previously to the filing of the bill in the present cause. [332]

The original bill in this cause was filed on the 7th of October, 1841, shortly after the decease of the survivor of the sons of Matthias Stackpoole, by Sarah Jane, and Mary Louisa Stackpoole, his daughters, against William Henry Stackpoole, Michael Stackpoole, Andrew Stackpoole, and William his eldest son, and other parties, defendants. The bill prayed, that the collateral limitations in favour of the brothers of Matthias Stackpoole contained in the settlement of the 15th of September, 1815, might be declared fraudulent and void as against the plaintiffs, and that the articles of the 11th of June, 1827, might be carried into execution, and proper conveyances of the lands of Moymore, Ballyfadeen, Knockersceagh, and Rannah, executed according to the trusts of those articles, the plaintiffs alleging that the collateral limitations of the former instrument were voluntary, and that they were purchasers for valuable consideration under the latter deed. * * *

The defendant, Andrew Stackpoole, by his answer, * * * insisted that the appointment intended to be made by the will and codicil of George Stackpoole the elder, of the lands of Moymore, Ballyfadeen, and Knockersceagh, was bad, as being an excessive execution of the power contained in the settlement of the 8th of October, 1767. [333]

The defendant, William Henry Stackpoole, by his answer * * * insisted, that the limitations to the brothers of Matthias contained in the settlement of 1815 were not voluntary; that that settlement operated as a covenant by Matthias Stackpoole to stand seised for

STACKPOOLE v. STACKPOOLE. the uses contained therein, and was binding upon the plaintiffs claiming under the articles of 1827, Louisa Mary M'Namara having had full notice of the deed of 1815.

[334] Michael Stackpoole, by his answer, relied on his undisturbed possession of the lands of Knockersceagh, from the time of the decease of George Stackpoole the younger, in 1816, and claimed the benefit of the Statute of Limitations, 3 & 4 Will. IV. c. 27, as a bar to the demand of the plaintiffs.

Mr. Moore, Mr. O'Brien, and Mr. Lysaght, for the plaintiffs :

The plaintiffs' demands in this case are, firstly, to the lands of Moymore and Ballyfadeen, and secondly, to the lands of Knockersceagh. The former claim depends upon the construction of the will of George Stackpoole, the elder, considered as an execution of the power given by the deed of 1767, and on the effect of the settlement of 1815, and articles of 1827. The latter claim involves the consideration of the shifting clause in the first codicil of George Stackpoole's will, and of the lapse of time since the decease of George Stackpoole, the younger, in the year 1816.

[339] [The cases cited by counsel on the former point are fully considered in the judgment. Upon the point of lapse of time they argued that] the statute does not apply, because by the deed of the 15th of September, 1815, these very lands were settled, and by the settlement Matthias's estate was cut down to a mere estate for life; the statute did not begin to run until 1816; therefore, although a good bar may have arisen to the assertion of Matthias's life estate, no bar can exist to the plaintiffs' rights, which did not, in point of fact, accrue until the decease of Matthias's surviving son, in the year 1840, only a few months previous to the filing of this bill. The defendants, who claim under the deed of 1815, are thereby estopped from setting up any claim adverse to that settlement: *Bensley v. Burdon* (1).

The Solicitor-General, Mr. Pigot, and Sir C. M. O'Loughlen, for the defendant, Andrew Stackpoole.

Mr. Serjeant Warren, Mr. William Brooke, and Mr. Brereton, for the defendants, William Henry Stackpoole, and Michael Stackpoole :

The settlement of 1767 confessedly did not authorize any appointment to the sons of the donee's children. The appointment, therefore,

to the sons of Matthias was void, and if, it is submitted, Matthias took only an estate for life, according to the terms of the appointment, then Andrew's title accrued, as first tenant in tail, under the gift in default of appointment. STACKPOOLE
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The doctrine of *cy près* cannot be applied to this case. [340]

[The cases cited by counsel upon this point and their arguments are fully considered in the judgment. Upon the point of lapse of time they argued :]

It is admitted that Michael Stackpoole has been in possession for more than twenty years : the right of Matthias accrued, if at all, [343]

in 1816 ; Matthias and the trustees of the settlement of 1815 were therefore barred, and the plaintiffs cannot be in a better position. No new rights could be created by the settlement *of 1815, so as [*344] to accrue at periods subsequent to 1816. The doctrine of estoppel has no application. The deed, in fact, could not operate by way of estoppel. In the first place, it was a settlement by lease and release, and it is now clear, that such a conveyance, being an innocent conveyance, as it is termed, cannot have any such operation: *Right v. Bucknell* (1), overruling *Bensley v. Burdon* (2). * * *

Mr. James O'Brien, in reply :

* * In this case the shifting clause in the codicil substituted [345]
another estate, which was to arise upon *a particular event. That [*346]
event happened, it is true, in 1816 ; but the prior settlement of 1815 prevented the statute from beginning to run, as against the plaintiffs, until the accruing of their rights, which did not, in fact, arise until the death of the issue male of the first marriage of Matthias.

The LORD CHANCELLOR having inquired whether the parties wished that he should himself decide the questions which had been raised, or that he should send a case to a court of law ; and being informed that it was the general wish that his Lordship should decide the case at once, proceeded as follows :

I am not aware that it would be worth while to reserve my judgment in this case for a future day. The questions which have been discussed at the Bar have so frequently engaged my attention, that I do not think further reflection would enable me to form a more satisfactory opinion than that which I am about to express.

As far as the lands of Knockersceagh are concerned, the case

STACKPOOLE depends upon the Statute of Limitations. As to the two remain-
 STACKPOOLE, ing denominations, the case depends upon several questions of great nicety.

[*347] I shall first dispose of the claim to the lands of Knockersceagh. In 1816 the event happened upon which the estate ought to have gone over, if the plaintiffs' title took effect at all ; and at that time a party was in possession, in favour of whose possession time would be a bar, and that *party has ever since continued in possession. If Matthias had not entered into a settlement previously to 1816, when his right is supposed to have accrued, time would have begun to run, and his estate would have been barred. It is admitted, that after the statute has once begun to run, a party cannot, by putting his estate into settlement, raise up new rights, and give new claims to persons deriving under the settlement. I have, therefore, to consider what was the operation of the instrument executed in 1815, by which, it is said, the rights are saved, and the bar of the statute prevented. That deed only intended to deal with the mere possibility, which the party had in the estate, and which is set forth in the deed ; and if anything turned upon the mode in which the party dealt with that interest, the deed shows that it was treated such as it really was. The recitals demonstrate that the settlor was perfectly aware of the nature of his interest, that it was a mere possibility. The deed does not profess to operate as a conveyance of any legal interest, and it clearly could not operate by estoppel, but only by transfer. This was settled by *Right v. Bucknell* (1), which decided, that a conveyance, by lease and release, being an innocent conveyance, could not work by estoppel, a doctrine which had been universally held by all real property lawyers, previously to the case of *Bensley v. Burdon* (2). The deed of 1815 could not pass any estate. It bound the settlor to give legal effect to the limitations contained in it, as far as his interest extended ; but I am at a loss to understand how it could create any new estate, so as to save the bar of the Statute of Limitations. The only estate in existence was his estate, whatever it was, and that was equitably bound by the agreement.

[348] But there is a still greater difficulty in this case ; for the plaintiffs, claiming under the marriage articles executed in 1827, claim that, which was not included in the settlement of 1815 ; and whatever interest was not included in the deed of 1815 remained in the settlor as an old reversionary interest. Now, I am not embarrassed

(1) 36 R. R. 563 (2 B. & Ad. 278).

(2) 25 R. R. 258 (2 Sim. & St. 519).

with claims under the settlement of 1815, for all the limitations of that instrument, as to this estate, have been exhausted; and as no person can claim under the deed of 1827, except as deriving under the settlor, and, consequently, cannot claim any higher right than he had, and as it clear that the statute effected its purpose against every estate vested in him, it follows, that the plaintiffs, who derive under the deed of 1827, are barred by the statute. I am, therefore, clearly of opinion that as to the lands of Knockersceagh, the plaintiffs have no title.

As to the two other denominations of these lands, the rights of the parties depend upon questions of the greatest nicety and difficulty. The first of these questions is, whether the *cy près* doctrine can be applied to the execution of a power. The power, in this case, authorized the tenant for life to appoint certain lands to his sons for estates, not exceeding estates tail; and the question is, whether he could, under that power, by will—(it is admitted, that by deed he could not)—raise an estate tail in a son, by devising the estate to his son for life, with remainder to trustees to preserve, with remainder to his first and other sons in tail male. In terms, the power did not authorize an appointment to any person except the sons of the donee of the power; it neither authorized the intermediate limitation to the trustees, nor the appointment to the grandsons as purchasers. But it was argued, that although the son could not, under the power, *take an estate for life, with remainder to his sons as purchasers, yet that, by the application of the *cy près* doctrine, that son might take an estate in tail male, and that if such an effect were given to the will, the general intent would be effectuated, and all the sons of the son and their male issue would take the same estates, as if the power had been strictly followed. It is true that, if I adopt this construction, I put it in the power of the son to prevent the estate from going to his sons; for at any time, by pursuing the proper forms, he may bar the estate tail, and dispose of the estate as he pleases. But, on the other hand, if I do not adopt that construction, I defeat the intention of the testator, for upon the death of the son, the estate will go away to collateral branches of the family, and his issue never can take; whereas, by the other construction, unless the son bar the entail, the estate will descend to all the issue for whom the testator intended to provide.

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The cases upon the doctrine go thus far. In *Chapman v. Brown* (1),

STACKPOOLE certain words had been omitted in the will by accident. The Court
 STACKPOOLE. of King's Bench took advantage of the omission in order to give an estate tail to the person who was capable of taking it according to the rules of law, from whom it would descend to the persons who would have taken by purchase, if there had been no mistake in the will. The construction which the Court adopted was ingenious, and opinions were expressed by the Judges who decided that case, that the limitations might have been supported by the application of the doctrine now contended for. This is explained by Lord ALVANLEY in *Routledge v. Dorril* (1). The objection to the limitations, however, was *not that they were an improper execution of a power, for the devise was of an interest, but that they were void, as being contrary to the general rule of law. In *Nicholl v. Nicholl* (2) the exact point arose, and a case was sent for the opinion of a court of law. The Judges certified in favour of the application of the *cy près* doctrine to the construction of the limitations there. This also was the devise of an estate, and not an execution of a power; but a will executed under a power is, within the limits of the power, to have the same favourable construction as a proper will; accordingly, in *Pitt v. Jackson* (3), which depended upon the execution of a power by will, Lord KENYON laid down the same doctrine clearly and decisively, although it ultimately appeared that it was not necessary to decide the point, either when the cause was first heard at the Rolls before Lord Kenyon, or when it subsequently, under the name of *Smith v. Lord Camelford* (4), came on before Lord Loughborough. The rule, however, was distinctly laid down by Lord KENYON, who was one of the most consummate real property lawyers that ever adorned the Bench; and he adhered to the opinion he then expressed to the latest moment of his judicial existence. I am aware that the doctrine has been questioned by authorities entitled to the highest respect, but it has never been overruled, and it has been adopted by Lord ALVANLEY and other great authorities. It has been truly said, that the doctrine goes to the very verge of the law, yet no one has ventured to say that it actually breaks in upon any rule of law. In my opinion it is the soundest construction, and I think I ought to act upon that rule in this case; I shall thus be enabled to *effectuate, to a great extent, the intention of the testator, who had power to do what I now do for him. I do nothing but give effect to a disposition, which, thus

(1) 2 R. R. 250 (2 Ves. Jr. 364, 365).

(3) 2 Br. C. C. 51.

(2) 2 W. Bl. 1159.

(4) 3 R. R. 36 (2 Ves. Jr. 698).

construed, will, unquestionably, be within the limits of the testator's power, and which he could himself have framed accordingly, had he been informed what the rule of law was upon the subject. I keep within the terms of the power, and I do not exceed his intention, and there is nothing in the nature of a power like this, as distinguished from property, which should prevent me from applying the doctrine to a devise under the power. I am therefore of opinion, that the *cy près* doctrine ought to be applied to this case, and that by its application, the limitation in question is a valid appointment to the son *quasi* in tail male (1).

[His Lordship then dealt with other questions which arose in this case, but which are not included in this report.]

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(4 Dr. & War. 380—392; S. C. 2 C. & L. 509.)

1843.
June 16.

A testator, by his will, charged his estates with 6,000*l.*, and directed "same to be paid to and among such of my younger children, as shall survive my said wife, in such shares and proportions, and at such times after her death, as she shall direct by her will or deed." His wife, by her will, directed as follows: "Robbert (the inheritor) give 3 of the 6,000*l.* I wish to have given, to the two elder girrels:" Held, that the appointees of the 3,000*l.* took as tenants in common, and not as joint tenants.

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L. C.
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Held also, that the remaining 3,000*l.* went equally among all the objects of the power.

The power in this case was not a mere power of selection. The donee had the power of settling the fund to and amongst the children in any way she thought proper, and if she had intended to create a joint tenancy she had power to do so.

Where there is a power to appoint to and amongst children, though there is no appointment, nor any gift in default of appointment, yet, by an implication arising from the terms of the power, there is a gift to the children living at the death of the donor, as tenants in common.

WILLIAM JOHNSON ALLOWAY, by his will, which bore date the 23rd of July, 1829, after certain provisions for Arthur Alloway, one of his younger children, devised as follows: "and in order to provide for my other younger children, I hereby direct, that after the death of my wife, Margaret Alloway, or before, if the executors consider it more fit or necessary, the sum of 6,000*l.* be raised by sale or mortgage of my said freehold estates of *Ballyshanduff and Ballycarroll, or either of them, and I hereby charge my said freehold estates with the payment thereof, and direct that same may be raised

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(1) See *Vanderplank v. King*, 64 R. R. 186 (3 Hare, 1).

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thereout in manner aforesaid, and that same be paid to and among such of my younger children, except my son Arthur, as shall survive my said wife, in such shares and proportions, and at such times after her death, as she shall direct by her will or deed (duly executed, appoint (1)): and if any of my younger children shall marry in the life-time of my wife, and with her consent, then the proportions of such younger child to be paid according to the provision contained in an article or settlement executed previous to such marriage: and, subject to such charge, to be raised in manner and for the purposes aforesaid, I leave, bequeath, and devise all my estates and interest in said lands of Ballycarroll and Ballyshanduff to my eldest son, Robert Alloway, his heirs and assigns, for ever."

The testator died in the month of October following, leaving his wife, Margaret Alloway, him surviving, and also six younger children, viz., Margaret Anne Alloway, Anne Alloway, Arthur Alloway, George Holmes Alloway, Maria Alloway, and John Parker Alloway.

In the year 1834, Margaret Alloway, the widow of the testator, made her last will, which did not bear any date, and was incorrectly spelt in every part. It commenced with the following paragraph, "Robbert give 3 of the 6 thousand pounds I wish to have given to the two elder girrels. I leave the girrels in gardenship of their aunt."

[*382] The will did not contain any other allusion to the charge of 6,000*l.*, or any reference to the power of appointment. It *was stated to have been dictated by the testatrix, during the illness of which she subsequently died, to her maid-servant, Teresa Jones, who committed the same to paper.

The testatrix died on the 18th of April, 1834, a few days after having signed the above will; at which period Margaret Anne Alloway, and Anne Alloway, the plaintiff in the present cause, were the two elder daughters, and they, upon the death of their mother, entered into the receipt of the interest of the sum of 3,000*l.*, each receiving the interest of the sum of 1,500*l.*

On the 16th of April, 1835, Margaret Anne Alloway died intestate and unmarried, and without having done any act to affect her interest in the 3,000*l.* so appointed by the testatrix.

Anne Alloway, the other elder daughter, upon the death of her sister Margaret, claimed the whole 3,000*l.* by survivorship,

as well as her proportion of the unappointed residue of 3,000*l.*; and differences of opinion having arisen as to the interests of the younger children, the present suit was instituted by Anne, for the purpose of having the rights of the several parties interested in said sum of 6,000*l.* ascertained and declared.

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The questions argued were: first, whether the power warranted an appointment in joint tenancy; secondly, whether the appointment created a joint tenancy; and, thirdly, whether the two elder daughters were entitled to any portion of the remaining 3,000*l.*

Mr. Serjeant Warren, Mr. Monahan, and Mr. Morgan, for the plaintiff:

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* * If the testatrix had been the owner of this 3,000*l.*, it is clear that the words used would have created a joint tenancy: *Campbell v. Campbell* (1). * * With regard to the unappointed residue of 3,000*l.* it is divisible among the objects of the power in equal shares, as tenants in common; the next of kin of Margaret taking her one-fifth in equal proportions.

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Mr. Moore, Mr. William Brooke, Mr. Longfield, and Mr. L. Bland, for Robert Alloway, the inheritor, and also one of the next of kin of Margaret Alloway.

The Solicitor-General and Mr. Johnston for others of the next of kin:

The will of the testator, William Johnson Alloway, did not authorize an appointment in joint tenancy. The donee of the power was not invested with any authority to regulate the estate to be bestowed; she had simply a power of selection among certain objects, a power to allot the shares which those objects were to take, and to appoint the times at which those shares were to be taken: *Rex v. The Marquis of Stafford* (2). * * The leaning of the Court is always in favour of a tenancy in common, *Taggart v. Taggart* (3). * * *

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Mr. Christian, for Maria Alloway and George Holmes Alloway, two of the younger children, submitted that the children, in whose favour no appointment had been made, were entitled to the whole of the unappointed residue. The testatrix intended the two elder

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(1) 4 Br. C. C. 15.

(3) 9 R. R. 19 (1 Sch. & Lef. 84).

(2) 8 R. R. 668 (7 East, 521).

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Mr. Monahan, in reply.

THE LORD CHANCELLOR:

In this case the testator, by his will, charged his estates with a sum of 6,000*l.*, and he directed that it should "be paid to and among such of my younger children, except Arthur, as shall survive my said wife, in such shares and proportions, and at such times after her death, as she shall direct, by will or deed duly executed." Now, the first question is, what is the meaning of this power given to the testator's wife? Nothing can be better settled than that a gift to and amongst a class of persons will create a tenancy in common; and *Casterton v. Sutherland* (3) shows that where there is a power to appoint to and amongst children, though there is no appointment made, nor any gift in default of of appointment, yet, by an implication arising from the terms the power, there is a gift to the children living at the death of the donor of the power as tenants in common. What, then, is the construction of the power, in reference to the interests, which the donee may confer by *exercising the power? The gift in default of appointment, and, therefore, until appointment, is in terms to the children as tenants in common; and the testator probably intended that the donee of the power should make a similar disposition; but still the wife clearly had the power of settling the fund to and amongst the children, in any way she thought proper.

The case of *Alexander v. Alexander* (4) has established, that although, in the case of words like the present, where the property is personal estate, the donee may not appoint to any but the children, the objects of the power, and cannot exclude any, or give a mere reversionary interest to any child, yet within these limits the donee may appoint in any manner he thinks proper. For example, he may give to one child a share for his own life, or for the life of another person, with remainder over to the other children, and he may cross the gifts from one to another, provided

(1) 5 Ves. 553. See judgment, *post*,
p. 723.

(2) 2 R. R. 546 (2 Ves. Jr. 351).

(3) 9 Ves. 445. See *Brown v. Higgs*,
4 R. R. 323 (4 Ves. 708).

(4) 2 Ves. Sen. 640.

only he give to each a real substantial share in possession, and not a mere nominal or reversionary interest. I am now speaking of the state of the law, as it stood before the late statute (1).

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It was contended at the Bar, that this was a mere power of selection, and several well-known cases were referred to in support of the position. In *Peters v. Morehead* (2), all that was decided was this, that where the instrument creating the power limited the quantity of the interest to be appointed, the donee had only a power to select the particular lands, in which that interest was to take effect. In some of the other cases, and particularly in *Rex v. The Marquis of Stafford* (3), the Court felt difficulties on the *point, whether a fee could be appointed, where the power only extended to issue, the expression "issue" seeming to point at descendants of the bodies, and therefore not to authorize an appointment in fee-simple. The Court, however, avoided the difficulty, and held that a fee might be given, inasmuch as the words "manner and form" followed the words "in such parts, shares, and proportions." *Phelp v. Hay* (4) was a case of the same class, the question being as to the extent of the interest which might be appointed under the power. A similar question came before me in *Crozier v. Crozier* (5), a case of much difficulty and importance. In *Liefe v. Saltingstone* (6), the words "manner and form" did not occur, yet the Court does not seem to have experienced the difficulty felt by the Court of King's Bench in *Rex v. The Marquis of Stafford*, and held that the power authorized the appointment of a fee. I do not mean to decide anything upon this point, but I may observe that my own opinion is, that where the power is created in general terms, and there is nothing upon the face of the instrument to control those terms, the Court ought to construe the power, as enabling the donee to appoint a fee-simple estate, and that it ought not to require the expressions "manner and form," or "shares and proportions," for the purpose of spelling out the intention of the donor, but should adopt the plain rule, that where the general scope of the power is not inconsistent with such a construction, the donee may appoint the absolute interest, whether in cases of real or personal estate. Where the subject is personal estate, as in the present instance, there can be no difficulty. Here there is not the slightest pretence for saying that the mother had a mere power of selection.

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(1) 1 Will. IV. c. 46.

(2) Fortesc. 339; Fitzg. 156.

(3) 8 R. R. 668 (7 East, 521).

(4) Treatise of Powers, App. 16.

(5) 61 R. R. 65 (3 Dr. & War. 353).

(6) Freeman, 149, 176; 1 Mod. 189.

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*It wants no authority to prove that a power to a parent to dispose of personal estate in such shares and proportions as she shall think proper, is something more than a mere power of selection. If in this case the mother intended to create a joint tenancy, she had power to do so. She had power to give a separate share to each daughter for her life, with remainder, as to the whole, to the survivor. Under a joint tenancy the effect would be the same, if not disturbed, although each daughter might make herself absolute mistress of her own share by severing the joint tenancy. I cannot say that this would not have been a valid disposition. However, it would not be a natural construction that she should mean to give a joint tenancy. The object was to provide for all the children. This is clearly shown by the particular provision for settling the shares of the children upon their marriage. The fair construction would give to each daughter a separate interest in her own share unless a different intention appeared on the face of the gift.

What, then, are its terms? When she was on her deathbed, unable to write, she dictated to her illiterate maidservant, who could not even spell correctly, this extraordinary document, which commences with this sentence, "Robbert, give 3 of the 6 thousand pounds I wish to have given to the two elder girrels." Does this, then, create a joint tenancy, or not? If I say, "I give to my two elder girls three thousand pounds," this is, no doubt, a joint tenancy. But the gift here is not in any such terms. The words are "Robert, give,"—words rather of direction than gift, as if she had said, "Deliver over." How, then, would such a delivery or payment be made? It would not be paid in a Bank-note; which they would carry away as joint *tenants; each would take her own separate portion. In default of any appointment the daughters would have taken their shares as tenants in common; and my opinion is, that the mother meant only to increase their shares, and to give the increased shares in the manner in which they would have taken in default of appointment: my decision, consequently, must be, that they took the 3,000*l.* as tenants in common. There is much difficulty in the case, and it is very possible that if another Judge were sitting in this place, he might arrive at a different conclusion; but still, in the absence of a clear intention to create a joint tenancy, I think I have adopted the true construction, and that which effectuates the intention.

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The question then remains to be considered, what is to become of

the remaining 3,000*l.*? No point can be better settled than this, that any portion of the fund or estate, which is not well appointed, goes in the same way as if there had been no appointment. Probably there is no case in which the parent, the donee of the power, meant that the appointee of a share of a fund should be entitled to any part of the unappointed residue, and accordingly, when instruments are carefully prepared, the conveyancer always guards against the operation of the rule of law upon the unappointed fund by the introduction of a hotchpot clause. The only case in which it was attempted to make an exception to the rule is *Wilson v. Piggott* (1), before Lord ALVANLEY. There several portions of the fund had been appointed by different instruments, and the sum appointed to one of the children was expressed to be, “her share of the portion provided for younger children,” under the *settlement, by which the power was created. Lord ALVANLEY tried to hold that the appointment operated as a satisfaction of their claims under the original settlement, but he found the rule of law too strong for him, and, notwithstanding his inclination to the contrary, he was compelled to let in all the children upon the unappointed portion of the fund. *Fortescue v. Gregor* (2) has quite a different application. The circumstances were of this nature: a person had a power of appointment in favour of three children over a fund in Court. A petition was presented that a third of the fund should be transferred to one of the children, and the order was accordingly made, the petition reciting that the donee of the power was desirous that the fund should be equally divided between the three children. The Court subsequently held this a good appointment of the whole fund, for although it was difficult, as Lord LOUGHBOROUGH observed, to consider a mere recital in a petition an appointment, yet it was sufficient to indicate the clear intention of the party that the other two children should take the residue of the fund, and this was the ground of the decision. So in this case, if there appeared to be such an intention expressed or implied at the execution of the power, I would decide in the same way. It was said, that I must read the clause as a gift of the 6,000*l.* in the first instance, and then a gift of 3,000*l.*, part of the 6,000*l.*, to the two elder daughters; but this is only a fanciful construction of the language of the will, while its sense is plain, meaning only, “I wish you, Robert, the person on whose property this money is charged, after my death, to give 3,000*l.* to my elder daughters.” The authorities rule this

ALLOWAY
^{c.}
 ALLOWAY.

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(1) 2 R. R. 246 (2 Ves. Jr. 351).

(2) 5 Ves. 553.

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 [*392]

case, and I, therefore, decide that the testatrix has *only disposed of 3,000*l.*, and that the 3,000*l.* not appointed is to go to the children living at the death of the testatrix, as in default of appointment.

With respect to costs, I shall direct the plaintiff to be paid so much of the costs of this suit as have been incurred, so far as same was properly constituted for raising said sum of 6,000*l.* out of the lands and premises charged thereby; and that so much of the costs as have been occasioned by the doubt arising upon the will of the said Margaret Alloway, and which would not have been occasioned in a suit for a sale, be paid out of said sum of 6,000*l.*—Reg. Lib. 88, fol. 158, 1843.

1843.

June 17.

SIR EDWARD
 SUGDEN,
 L. C.
 [431]

SHAW v. M'MAHON (1).

(4 Dr. & War. 431—441; S. C. 2 C. & L. 528.)

A testator gave a surplus fund, constituted of the accumulation of certain rents issuing out of freehold and leasehold estates, to be divided in equal parts amongst all his children living at his death.

By a codicil the testator revoked the gift to W., one of the children:

Held, that the share which had been given by the will to W., belonged to the other children, and did not devolve to the heir-at-law and next of kin of the testator.

SIR WILLIAM M'MAHON, Bart., late Master of the Rolls in Ireland, was twice married, and had living at the time of his death two sons, viz., Beresford Burston M'Mahon and William J. M'Mahon, issue of his first marriage, and six children by his second wife.

Sir William M'Mahon made his will, bearing date the 2nd of April, 1836, and, after stating certain reasons for which he did not wish his sons Beresford and William J. to enjoy his property, proceeded as follows: "It is my will, while I provide for both my said sons, and secure to the child or issue of my son Beresford a devolution of my general landed and other property, subject to the prior trusts, &c., hereinafter expressed, that the surplus income of the residue of my assets and property, real, personal, and mixed, after providing for the several particulars and prior charges hereinafter made, shall be equally, during the life-time of my son, Beresford Burston M'Mahon, divided between all my children, including the said Beresford and William, in equal shares, during the natural

(1) *Ramsay v. Shelmertine* (1865) L. J. Ch. 33; *In re Featherstone's* L. R. 1 Eq. 129; *In re Coleman and Trusts* (1882) 22 Ch. D. 111, 52 L. J. *Jarrom* (1876) 4 Ch. D. 165, 170, 46 Ch. 75, 47 L. T. 338.

life of the said Beresford." The testator then devised and bequeathed all his property to trustees upon the trusts of his will. He then bequeathed legacies of 7,000*l.* to four of the children of his second marriage, and legacies of 6,000*l.* to the remaining two children of that marriage; and the testator declared that those legacies should bear interest at five per cent. from his decease; that they should be vested in his daughters at the age of twenty-one years, or upon their marriage, with the *consent of his trustees, and in his sons at the age of twenty-five years; and certain conditions were attached to these legacies, to take effect in the event of marriage without consent by the daughters or by the sons under the age of twenty-five years.

SHAW
M^r. MAHON.

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The testator then provided for the payment of Lady M^r. Mahon's jointure, and bequeathed annuities to his sons Beresford and William, and remitted certain debts due by them to him; and after some other gifts and directions, not material in reference to the questions in this case, the will proceeded in the words following, viz.: "It is my will, that my said trustees shall, after payment, &c., apply the surplus rents and profits, interest, dividends, and income of all my property, of every kind whatever, real, personal, and mixed, in and towards the payment and satisfaction of the said legacies bequeathed to my said children by my said wife Charlotte (testator's second wife), if my personal estate shall be deficient in any sum to pay and satisfy the same, and in augmenting the said legacies to my said daughters, Charlotte, Louisa, and Wilhelmina, to 10,000*l.* each, and to my said sons, Robert, Augustus, and Charles, to 10,000*l.* each, such increase and addition to the said legacies to be made without any calculation of interest whatever upon the said increases, to be added to the said legacies: and it is my will and direction that interest only shall be calculated on the original legacies bequeathed as aforesaid." The testator directed that these additions should be made, whether Beresford should be living or not; and provided, that if the augmentations should not be effected in the life-time of Beresford, the tenant for life of his property should only receive 500*l.* per annum until the additions were made. The testator then provided for the *purchase of a company in the Foot Guards for his son Beresford: "and when the aforesaid trusts shall be realized, the said surplus fund hereinbefore mentioned I direct shall be deemed and taken to be the surplus rents, issues, and profits, dividends, interest, and income, of all my property, real, personal, and mixed,

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which shall remain during the life-time of my said son, Beresford Burston M'Mahon, and which shall be receivable by my said trustees, after performing the aforesaid trusts. I direct that the balance of the annual surplus fund shall be ascertained each year by my trustees, during the life of my son Beresford, and that there shall be first deducted the sum of 1,200*l.*, and the same shall be invested in Government stock, and the dividends thereof from time to time re-invested in like stock to accumulate as a fund, during the life-time of the said Beresford, to purchase any eligible property which may offer in the county of Tyrone; and I direct that such property when purchased, and the said fund in the meantime, to go and pass pursuant to the limitations, &c., in the same course as the rest of my property is limited to pass under this my will from the death of the said Beresford. And I direct, and it is my will, that the residue of the balance, when ascertained, shall be divided in equal parts amongst all my children living at my death, including my sons Beresford and William John, &c.; and I expressly direct that such surplus fund shall only continue during the natural life of my said son Beresford."

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The testator then proceeded by his will to limit the estates themselves in a series of uses to take effect after the decease of his son, Beresford Burston M'Mahon: and he directed, that if any of his sons should involve his family in litigation touching the validity of his *will, every legacy and interest devised or bequeathed "to such son or sons so acting, shall in that event stand revoked, and fall into the general residue of the said trust estates and funds in the same manner as if the same had never been mentioned in this my will, and as if the son or sons so acting had died under age, unmarried, and without issue, &c.; but I do not mean to refer to any litigation which may justly be necessary for the construction of any part of this my will, or for placing my property, or any part of it, or the rights of my minor children, under the protection of the court of equity."

Sir William M'Mahon subsequently made a codicil to his said will, bearing date the 4th of August, 1836, and thereby, after reciting his displeasure at the conduct of his son William J. M'Mahon, in relinquishing his profession, revoked "the other bequest and provision made for him by my said will, save the life annuity of 300*l.* per annum devised and bequeathed to him for life;" and save also the legacy of the debt due from William to the testator; and the testator directed that the annuity and the

remission of the debt should be subject to the condition with reference to litigation above stated.

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M'MAHON.

The present suit was instituted by the trustees of the will to carry its trusts into execution, and the usual decretal order was pronounced, whereby it was referred to the Master to take the usual accounts and report generally upon the property.

On the 14th of June, 1848, the Master made his report, and thereby, amongst other matters, reported, "that according to the true construction of the said will and codicil, *the bequest to William John M'Mahon thereby revoked sank into and became part of the surplus income of the residue of the real, personal, and mixed estate of the testator, and that each of the children of the testator, except William John M'Mahon, was entitled to an equal seventh share of this surplus income, subject to the prior trusts of the will."

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To this report exceptions were filed by Sir Beresford Burston M'Mahon, insisting that the Master ought to have found that the testator had died intestate as to the property which had been given to William John M'Mahon by the will, and was revoked by the codicil; that Beresford was entitled to so much of that property as consisted of real estate, he being the testator's heir-at-law, and that so much thereof as consisted of personal estate was equally divisible amongst all the children of the testator, including William John M'Mahon. * * *

Mr. Serjeant Warren, Mr. Brooke, and Mr. Wall, for Sir Beresford B. M'Mahon. * * *

Mr. Moore and Mr. Augustus M'Mahon for the younger children. * * *

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Mr. Serjeant Keatinge and Mr. Charles Shaw for the plaintiffs.

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THE LORD CHANCELLOR:

The case of *Cresswell v. Cheslyn* (1) was well decided; but there the gift was to the three children expressly as tenants in common and *nominatim*, and upon that ground the case has been distinguished from others. There is no doubt, however, that modern authorities have attached more weight to the circumstance of the legatees taking as a class, when the gift to any one legatee fails, than the earlier cases did. It is now settled, and, in my opinion,

(1) 2 Eden, 123.

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*
M'MAHON.

upon very reasonable grounds, that where there is a gift to a class, and one dies in the testator's life-time, his share will not lapse, but the whole will be divided amongst the survivors. If, therefore, I can discover in this instrument sufficient evidence of the testator's intention that the remaining children should take the share of the residue originally bequeathed to his second son, there is authority to give effect to that intention.

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The testator commences by stating, that he means the residue of his estate to go equally amongst all his children ; and when he comes to the actual disposition he says, the residue shall be divided in equal parts amongst all his children living at his decease, including his two sons, *Beresford and William John. It is manifest that he included those two sons by name, for the reason stated at the Bar, viz., because they were the children of his first marriage. This, consequently, does not vary the case, and it stands as a gift of the residue to all the children after the death of the testator. He might have given the residue to all the children by name, but he does not do so, he treats them as a class. Then follows the clause, providing that in case any of his children should litigate, that is, should adversely dispute, the validity of his will, all the gifts to those parties should be null and void, and the property intended for them should go as if they had not been mentioned in the will. Now it is clear that, under this proviso, if the event happened there would have been a revocation of the gifts to the children so acting, and no portion of the residue would have been undisposed of, but the whole would have gone to the other residuary legatees.

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Then comes the codicil, in which the testator, after expressing his disapprobation of the conduct of his second son, says, " I hereby revoke the other bequest and provision made for him by my said will, save the life annuity of 300*l.* per annum bequeathed to him for life, and save as to the legacy to him of the debt due by him to me. And I direct that the said annuity and legacy of the said debt due by him are subject to be annulled and revoked in manner provided by my will, in case he shall involve my wife, Charlotte, or any of his brothers or sisters, in litigation ; and in such event I hereby revoke and annul the devise and bequest of the said annuity and the said debt so due by him." Here again I find the testator acting upon the clause in his will relative to litigation of his *will, leaving no doubt as to his meaning ; and no person can dispute, that if the second son, having taken the substituted

portion provided for him by the codicil, were to do the act intended to be guarded against, the effect would be a revocation of this interest and an entire exclusion from all benefit under either instrument. Had the testator then a different intention, as to the larger provision, in the event upon which the condition of forfeiture was imposed? A large provision is made in his will by a parent for his child, subject to a certain clause of forfeiture; by his codicil he revokes that large provision, substitutes for it a smaller gift, and says that the latter gift is to be subject to the same condition. Under the will, in the event of a forfeiture taking place, the gifts so forfeited, and amongst them the share of the residue, would go to the other children. Can I then construe differently the substituted gift? The effect of such a construction, as far as relates to the personal estate, would be, that Beresford, as one of the next of kin would take a portion of it, and not only Beresford, but also William, the very son whom he intended to exclude from all interest except the 300*l.* per annum. This clearly was not his intention, and there is no rule of law which compels me to adopt this construction. On the contrary, the authorities are in favour of the opposite construction. The gift is to a class, and the time of the death of the testator is the period when the objects included in that class are to be ascertained, and at that time William is excluded by the codicil. I am clearly of opinion that I disturb no rule of law, and give effect to the plain intention of the testator, in deciding, that William is excluded from any share of the residue, the whole of which must go to the other residuary legatees. *Let the exception be overruled, without costs, as this is an amicable suit.

SHAW
C.
M^{rs} MAHON.

[*441]

BLACKWOOD *v.* BORROWES.

(4 Dr. & War. 441—477; S. C. 2 C. & L. 459.)

1843.
June 1.

The sale of a reversionary interest comprised in a settlement under a power of sale in the ordinary form is not improper, though it may benefit the tenant for life at the expense of the remainderman.

SIR EDWARD
SUGDEN,
L. C.

The release for valuable consideration of a trustee from all liability in respect of an improper investment accompanied by the acceptance of an investment may operate as a release of the representative of a deceased co-trustee in respect of the same investment.

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Generally speaking, where a sale has been made without the concurrence of the trustees, if the sale was a proper one, and the trustees have adopted it, the Court will carry it into execution.

By indenture bearing date the 21st of November, 1801, and made between Patrick Richard Blackwood Brady of the first part; Mary

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Blackwood, widow, the mother of *the said Patrick Richard Blackwood Brady, of the second part; Samuel Madden and Catherine Madden, his daughter, of the third part; the Rev. Dudley Charles Ryder, the grandfather of the said Catherine Madden, of the fourth part; and James Blackwood and Charles Powell Leslie of the fifth part; being the marriage articles executed upon the occasion of the marriage of Patrick Richard Blackwood Brady and Catherine Madden; after reciting (*inter alia*), that the said Catherine Madden was seised in her own right of certain lands in the county of Leicester, in the kingdom of England, it was witnessed, that when and so soon as the said Catherine Madden should attain her full age of twenty-one years, she would well and sufficiently convey and assure unto the said James Blackwood and Charles Powell Leslie, their heirs and assigns, all her estate and interest, of every nature and kind soever, in the said lands situate in the county of Leicester, or elsewhere in Great Britain, upon the trusts and to and for the intents and purposes thereafter expressed and declared; that is to say, in trust for the said Catherine Madden and her assigns, for and during her natural life; and immediately after her death upon trust for the said Patrick Richard Blackwood Brady and his assigns, for and during his natural life, if he should survive the said Catherine Madden; and from and immediately after the death of the survivor of them in trust for the younger children of the said intended marriage, whether sons or daughters, and their respective heirs, equally to be divided amongst them if more than one: and it was by the said deed declared, that in case any of such younger children should die under the age of twenty-one years, without leaving issue living at their respective deaths, or *which should be born in due time after; or if any of such younger children should become an eldest son, before he should become entitled to his proportion of the said lands in possession, in such case the share of such younger child or children so dying or becoming an eldest son, should go and belong to the survivor or other younger child or children, and his, her, or their heirs: and in case there should not be any younger child of the said marriage, which should attain the age of twenty-one years, then that said lands should revert to the use of said Catherine Madden and her heirs for ever. The articles then contained a covenant on the part of Dudley Charles Ryder and Samuel Madden, that they would at all times do and execute all acts, deeds, and conveyances requisite for effectually vesting the said lands in the said James Blackwood and Charles Powell Leslie,

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for the purposes therein mentioned, so as, however, not to injure, prejudice, or affect any estate or interest, which the said Dudley Charles Ryder and Samuel Madden (who were successive tenants for life) had in the said lands or any part thereof.

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BORROWES.

The deed then contained a power of sale, which was in the following terms: "Provided always, and it is declared and agreed by all the parties to these presents, that it shall and may be lawful to and for the said James Blackwood and Charles Powell Leslie, by and with the consent of the said Patrick Richard Blackwood Brady and Catherine Madden, his intended wife, under their hands and seals, for that purpose had and obtained, to sell the whole or any part of the said lands, tenements, hereditaments, and premises of the said Catherine Madden, in Great Britain, and lay out the money to arise from such sale or sales, in the purchase of lands in fee simple in Ireland, or *in Government securities, at the election of the said Patrick Richard Blackwood Brady and Catherine Madden, or the survivor, which purchased lands, or money to be so lent on Government securities, are to be subject to the same trusts, and go and be paid to such person and persons as are hereinbefore mentioned and specified with respect to the lands, tenements, hereditaments, and premises in Great Britain, in case the same had not been sold, and such securities, if taken, to be deemed and considered as land and go accordingly."

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Immediately upon the execution of the deed the marriage was solemnized, and there was issue thereof two children, a son and daughter; the latter of whom, Catherine, was the plaintiff in the present cause. Catherine Blackwood Brady, the plaintiff's mother, having attained her age of twenty-one years, and her grandfather, Dudley Charles Ryder, having died in the meantime, a settlement was executed pursuant to the provisions of the articles of the 4th of November, 1801. This deed, which bore date the 20th of November, 1804, was made between Patrick Richard Blackwood Brady and Catherine his wife of the first part, the said Mary Blackwood of the second part, Samuel Madden of the third part, and James Blackwood and Charles Powell Leslie of the fourth part: and after reciting the articles of November, 1801, and the said marriage, and that Catherine Blackwood Brady had attained her age of twenty-one years, and that she was entitled to one-fourth of the manor of Newton Nethercot, in the county of Leicester, and also to one-fifth of an undivided moiety of the manor of Snareston in the said county, the said deed witnessed, that in execution of the

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said articles, and for assuring and conveying the said lands and premises *upon the trusts thereafter contained, they, the said Samuel Madden and Catherine Blackwood Brady, by and with the consent of her husband, released the said lands and premises to James Blackwood and Charles Powell Leslie, their heirs, &c., upon trust, as to Snareston, to the use of Samuel Madden for his life, and from and after his decease, as to said lands of Snareston, and from the date of the settlement as to the other lands, upon the same trusts, and to and for the like uses declared by the articles of the 21st of November, 1801.

The deed then contained a power authorizing "Samuel Madden and the said Catherine Blackwood Brady, and the said Patrick Richard Brady, her husband respectively, when and as they shall be respectively in the actual possession of the said messuages, lands," &c., to make leases for one, two, or three lives in being, or for any term not exceeding thirty-one years, to take effect in possession, and at the best and most improved yearly rent. Then followed a power of sale to the trustees, James Blackwood and Charles Powell Leslie, by and with the consent of the said Patrick Richard Blackwood Brady and Catherine his wife, or the survivors of them, under his hand or their hands and seals, "to sell the whole or any part of the said Catherine's estate and interest in the said manors or tenements, cottages, lands, tenements, and hereditaments, situate in the county of Leicester aforesaid." In every other respect this power corresponded with the power of sale contained in the articles of November, 1801, already stated. The deed further contained a covenant on the part of Samuel Madden, and Brady, for himself and his wife, to levy fines to enure to the uses of the settlement, and for the trusts therein expressed.

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Catherine Blackwood Brady had three sisters and one brother, who were each entitled to corresponding shares in the said Leicestershire estates. One of the sisters, Charlotte, had intermarried with Mr. Robert Borrowes (one of the defendants in this cause), an Irish solicitor, and upon the occasion of her marriage, her share was vested in trustees, one of whom was the said Charles Powell Leslie, upon certain trusts for the issue of the marriage, with a life estate therein to the said Robert Borrowes.

In the year 1812, a treaty was set on foot for the sale of the Leicestershire estates, all of which were sold in that or the following year, for the sum of 32,167*l.*, the tenant for life of Snareston having concurred therein, and his life interest being valued by

Mr. Morgan, an actuary, at 5,059*l*. It was represented that Mr. Borrowes had taken the principal part in the conduct and management of this sale; that he had acted as the solicitor of the several parties interested, and had instructed the English solicitors who were employed upon the occasion; that the trustees were never consulted as to the propriety of the sales; and that in fact none of the parties interested had given any directions respecting the sales except Borrowes. The share of the purchase-money, to which the parties claiming under the articles and settlement of 1804 were entitled, came to the hands of Borrowes (1), and he, in the year 1814, lent thereout a sum of 3,000*l*., late Irish currency, to Mr. Robert La Touche, upon the security of a bond with warrant of attorney collateral therewith, executed to the trustees, Blackwood and Leslie, in whose names judgment was entered in the year 1819. Mr. Borrowes also lent out of the said proportion of the purchase-money to Patrick Richard Blackwood Brady, the plaintiff's father, a sum *of 3,332*l*. Irish currency, upon the security of a bond and warrant, and the assignment of a policy of insurance which had been effected with the Equitable Assurance Office, for the sum of 3,000*l*.; the premium upon the latter sum was paid out of the interest accruing from the loan to Mr. Robert La Touche.

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In the year 1830, Charles Powell Leslie died, having appointed Christiana Leslie, his widow and one of the defendants in this cause, his executrix. In the beginning of the year 1838, James Blackwood, who up to that time, as it appeared, had never taken any part in the management of the trusts of the settlement, became acquainted with the manner in which the two sums of 3,000*l*. and 3,332*l*. had been laid out; and Blackwood being himself a creditor of Brady, upon foot of two judgments obtained by him against Brady in Michaelmas Term, 1832, and having instituted proceedings thereon, obtained a receiver over the rents of the life estate of Patrick Richard Blackwood Brady. In this state of circumstances all parties, including Mr. Borrowes, being under the impression that Catherine Blackwood Brady, the plaintiff's mother, was, under the articles of 1801, and settlement of 1804, entitled to a separate use for life in the funds purchased by the sales of the English estates, a case on behalf of Catherine Blackwood Brady, prepared by her

(1) Borrowes explains in his answer, *post*, p. 736, that he received this share as agent for the trustee C. P. Leslie, and under his authority, and disposed of it in this way by the direction of Leslie.—O. A. S.

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then solicitor, Mr. Hall, with the assistance of Borrowes, and corrected by him, was laid before Mr. Blackburne, the present Master of the Rolls. The first question in this case, which was added by Borrowes himself, was as follows: "Counsel is requested to point out to Mrs. Blackwood the course she should adopt to obtain the full annual income of that part of her property settled to her separate use by the articles of the 20th of November, 1801, [*448] *and the settlement of the 20th of November, 1804, namely, the interest in the sum of 6,382*l.*, for which part of the English estates were sold," and to point out any funds applicable to the payment of the premium on the policy of insurance effected with the Equitable Assurance Company on the life of Brady, and whether the claim of James Blackwood, on foot of his judgments, could be resisted, and if so, the course that should be taken. From the opinion of Mr. Blackburne it then appeared that Catherine Blackwood Brady was not entitled to a separate estate in the funds, which were the subject of the articles and settlement of 1804. Subsequently to this a treaty was set on foot, and a long correspondence, which terminated in a deed of the 15th of July, 1839. This deed, which was made between James Blackwood of the first part, Patrick Richard Blackwood Brady and Catherine his wife, of the second part, [the plaintiff Catherine Blackwood Brady, the daughter, therein referred to as] Catherine Blackwood (1) of the third part, and the Rev. Silver Oliver of the fourth part: after reciting the articles of the 21st of November, 1801, and the settlement of the 20th of November, 1804, and the sales of the English estates, and the loans to La Touche and Brady; that the said Catherine Blackwood had attained her majority in the year 1827; that Leslie was dead, and that James Blackwood was the surviving trustee of the said settlement; that the said James Blackwood had, in Michaelmas Term, 1832, obtained two judgments against the said Patrick Richard Blackwood Brady, upon which there was then due and owing the sum of 1,885*l.* 19*s.* 6*d.*; and reciting further, that it had been agreed, for the purpose of settling all disputes between the parties, that James Blackwood should assign to Silver Oliver all the trust premises, and the several trusts vested in him by the articles of November, 1801, and the settlement of November, 1804; and should [*449] release *Patrick Richard Blackwood Brady from the said sum of

(1) The plaintiff is also named as Catherine Blackwood in the title of this report, but it is not stated when

she discontinued the use of her proper surname Brady.—O. A. S.

1,885*l.* 19*s.* 6*d.* in consideration of the sum of 300*l.*, to be paid to him by the said Brady, and also in consideration of being released from all responsibility arising from the said trust premises; and reciting further, that said sum of 300*l.* had been paid to James Blackwood in satisfaction of said sum of 1,885*l.* 19*s.* 6*d.*, and that the said judgments so obtained as aforesaid by James Blackwood, and all claims thereon, had ceased and determined: said deed witnessed, that in pursuance of said agreements, the said James Blackwood, with the assent, and by the desire of the said Patrick Richard Blackwood Brady and Catherine his wife, and of the said Catherine Blackwood, assigned unto the said Silver Oliver the said trust premises, so vested in him, as surviving trustee as aforesaid, and the aforesaid judgments so obtained against the said Robert La Touche and Patrick Richard Blackwood Brady, and the said policy of insurance, to hold the same upon the trusts of the articles and settlement, or such of them as still remained subsisting; and the said Patrick Richard Blackwood Brady and Catherine his wife, and the said Catherine Blackwood, did thereby release and for ever discharge the said James Blackwood of, from, and against all actions, claims, and demands, which they or any of them could have against him, for or on account of any matter, cause, or thing whatsoever in any manner relative to the trusts before mentioned, or to the trust premises in him vested, or any investment or disposition thereof made by him or with his assent; and the said Patrick Richard Blackwood Brady and Catherine his wife, and the said Catherine Blackwood, did thereby for ever discharge the said James Blackwood from his office of trustee, and from all liability to act further therein; and did thereby covenant to indemnify James Blackwood from all liability by reason of his having accepted *the office of trustee under the said deed, or having done any act theretofore in relation to the said trust premises.

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On the 29th of September, 1841, the plaintiff filed the bill in the present cause against the said Robert Borrowes, James Blackwood, Christiana Powell Leslie, the executrix of Charles Powell Leslie, Patrick Richard Blackwood Brady, and Catherine, his wife, and Rev. Silver Oliver; and thereby [disputed the propriety of the sale and the validity of the deed of 1839, and] prayed that the trusts of the articles of the 21st of November, 1801, and the settlement of the 24th of November, 1804, might be carried into execution: that an account might be directed of the produce of the sales, and of the share to which the plaintiff became entitled to have laid out in pursuance

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of the trusts of the articles and settlement, and how and in what manner same was applied: and that the defendants, Borrowes, James Blackwood, and Christiana Leslie, or such of them as the Court should think fit, should be declared responsible for all such portions of the purchase-money which they should appear to have received [and prayed consequential relief]; and concluded by asking for a declaration, that the plaintiff ought not to be bound by the indenture, so as aforesaid executed in the year 1839, and that same might be declared fraudulent and void, so far as same respected the rights of the plaintiff in the present suit, or so far as the Court should think fit to direct.

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The defendant, Borrowes, by his answer, admitted that the share of the purchase-money which belonged to Patrick Richard Blackwood Brady, and Catherine, his wife, and which the defendant represented to be different from that stated in the bill (in a very unimportant amount, however), had been received by him, but upon the authority, as he alleged, of the said Charles Powell Leslie. He further admitted, that he was the party who had been instrumental in effecting the loans to Mr. La Touche and Brady; but he stated that both of said loans were made with the knowledge, and by the desire of, Leslie, and upon the assurance of the said Patrick Richard Blackwood Brady himself, that both the sales of the estates, and the application of the purchase-monies, had the full approbation and concurrence of James Blackwood. With regard to the sufficiency of the security of Mr. La Touche, the defendant stated that he was, at the *time of the loan, tenant in fee simple of property producing several thousand pounds per annum; and that with respect to the loan to Patrick Richard Blackwood Brady, it was collaterally secured by a policy of insurance, the value of which, as appearing from the tables published every ten years by the Equitable Assurance Company, was, on the 1st of January, 1840, worth a sum of 7,080*l.*, and if now surrendered to the Company, would produce a sum of 4,266*l.* And the defendant offered, by his answer, to pay into Court, to the credit of the cause, the whole amount of the sums so invested, upon getting a valid assignment of the said several securities and policy of insurance.

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[The evidence satisfied the LORD CHANCELLOR that the plaintiff had executed the deed of 1839 with full knowledge of all the facts and full capacity to determine what was most to her interest, and that no attempt had been made to take advantage of her.]

Mr. Serjeant Keatinge, Mr. Moore, and Mr. Brereton, for the plaintiff: BLACKWOOD & BORROWES.

The power of sale in this case did not authorize a sale during the life of the tenant for life. * * The power in terms was to sell the whole of the lands, manifestly showing that it was a sale of the whole fee, and not of a mere remainder, which the parties contemplated. But even assuming that the power was capable of being exercised during the existence of the previous estate, the trustees ought to have concurred. The cestui que trusts were entitled to have had the benefit of the advice and discretion of both trustees; and these trustees, or the defendant, Borrowes, who acted as their substitute, and by whose interference and agency the whole affairs of the trust estates were conducted, must be held answerable for the consequences. With regard to the release of July, 1839, to James Blackwood, it cannot be held to operate as a release to Charles P. Leslie or his assets: his personal representative (for, when the deed was executed, Leslie was himself dead) was not a party to the deed, and the parties never intended to release the estate of Leslie. *Payler v. Homersham* (1) shows that general words in a release are qualified by the recitals: and it is equally settled, that a release shall only bind the releasor, so far as he was acquainted with the facts and the effect of the release. The plaintiff here was at liberty to proceed against the estate of Leslie alone, *Walker v. Symonds* (2), or against Borrowes, who, in point of fact, has by his conduct rendered himself a trustee: Borrowes was the person to whom the produce of the sales was paid, and by whom that produce was laid out upon securities, which were clearly out of the scope of the trust. It cannot avail the personal representative *of Leslie to rely upon the fact that the money did not come to the hands of Leslie: a trustee is liable for a breach of trust if he be aware of the transaction, even though he has not received any part of the trust funds: *Brice v. Stokes* (3).

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Mr. W. Brooke, and Mr. Butt for Christiana P. Leslie :

There was not any breach of trust committed by the exercise of the power of sale, at the period in question. [Upon this point they cited *Clark v. Seymour* (4).] But even assuming that a breach of

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(1) 16 R. R. 516 (4 M. & S. 423).

(2) 19 R. R. 155 (3 Swanst. 1).

(3) 8 R. R. 164 (11 Ves. 319).

(4) 7 Sim. 67. The power of sale

there expressly authorized the sale of a reversion with the consent of the tenant for life.—O. A. S.

BLACKWOOD trust was committed, the release to one of the trustees, Blackwood, executed with full knowledge of the circumstances, operates clearly to the release of the others; for otherwise, inasmuch as the latter, by having been himself made accountable, would have an equity to call upon the former to recoup him, *Walker v. Symonds* (1), the release would in the result be mere waste paper. It is said at the other side, that a cestui que trust is at liberty to proceed against any one of a number of trustees implicated in a breach of trust. The rule of this Court is not so: all of such trustees must be brought before the Court, *Munch v. Cockerell* (2).

Mr. Serjeant Warren, and *Mr. Gayer*, for the defendant, Borrowes:

Borrowes acted as the mere agent of one of the trustees; he was himself beneficially entitled to a portion of the property in question, but he was not a trustee, nor invested with any fiduciary character; he is not, therefore, in any way liable: *Stacey v. Elph* (3). * *
 [467] If the Court thinks proper, the defendant, Borrowes, is willing now, upon an assignment of these securities, to pay in the sum invested in them.

Mr. Moore, in reply.

THE LORD CHANCELLOR:

The discussion which has taken place has made this case somewhat plainer than at first sight it appeared to be: it now seems to lie in a small compass.

Catherine Madden, the mother of the present plaintiff, was entitled to an estate in England in remainder, expectant upon the deaths of her father and grandfather, and being about to be married, articles were executed, whereby this estate, together with some other property, was made the subject of settlement. The arrangement was, that the *young lady, when she should attain her full age, would convey the lands to the uses of the settlement, and the father and grandfather, who were the owners of the previous life estates, agreed to join therein, without prejudice, of course, to their life estates; and there was a proviso that the trustees should have power to sell the whole or any part of the lands, and invest the produce in the purchase of estates in Ireland or in Government securities, such estates, as the case might be, or

(1) 19 R. R. 155, 179 (3 Swanst. 1, 77).

(2) 42 R. R. 165 (8 Sim. 219).

(3) 36 R. R. 304 (1 My. & K. 195).

Government securities, which were to be regarded as land, when purchased, to be subject to the trusts of the settlement. The only uses declared were to the husband and wife and their issue. There was no resettlement of the estates of the previous tenants for life, nor any provision for them. It appears to be clear that the power of sale extended over the whole subject of the settlement, but the question arises, what is the true construction of such a power of sale, not confined in terms to be exercised when the estates should fall into possession.

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It is settled by the authorities, that unless there be a restriction against an immediate sale, the power may be exercised at once, so as to increase, or rather advance, the interest of the tenant for life at the expense of the remainder-man; for if, instead of waiting for the expiration of the particular estate, the reversionary interest be sold, it must, of course, be sold at a much less price than the estate in possession would have produced. The authorities have, however, settled the question, and wisely, I think, established, that if there be no intention expressed, the power may be exercised immediately.

It is then stated that a settlement was executed about *three years afterwards, upon the young lady's coming of age, by which the rights were altered. By that settlement the lady's father (the grandfather having died in the meantime) and the wife, with the consent of the husband, conveyed to the trustees. It has been argued that this is not a conveyance of the legal estate, inasmuch as the husband did not join as a conveying party, but he covenanted that he and his wife would levy a fine, and that the father would join therein for the purpose of effectually conveying the estate to the uses of the settlement, and without such fine the settlement would have rested upon the articles of 1801. By this deed, the tenant for life having joined with the party in remainder, the whole fee passed to the trustees; and the uses were declared to be, as to part of the lands, to the father for life, and as to that part so limited to the father, from the period of his death, and as to the residue, from the date of the settlement, to the wife and her husband for successive life estates, and then to the younger children of the marriage in equal shares in tail general. There were two powers in the settlement, a power of leasing and a power of sale. The power of leasing is given to the tenant for life, the father, and then to the husband and wife, when in actual possession, and they are thereby empowered to make

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certain leases. The framer of this settlement knew perfectly well how to express such an intent, and to prepare a power of leasing, which was to be restricted as to the time of its being exercised; but he did not frame the power of sale in a very workmanlike manner; still the intention is clear. Before, in the former power the language is, that the parties may grant leases, "when and as they shall be respectively in the actual possession of the said messuages, lands, &c." In the power of sale the *expression is, that it shall be lawful for the trustees "to sell the whole, or any part of the said Catherine's estate and interest in the said lands, &c." Now her interest was a remainder in fee, expectant upon the life estate of her father: the power of leasing was given to the parties, as they should be respectively in possession. The power of sale was general: it was over the estate and interest of the lady, whether in possession or not, although not so expressed in terms. It is said that this would introduce some difficulty in the manner of limiting the uses of the produce of the estates, which were declared to be subject to the uses before specified. No doubt in words the limitations of these uses would seem to include the life estate of the father, but that was not the intention, because, if the power of sale is confined to the estate and interest of Catherine, and her remainder only was sold under the power, it would, of course, be against the intention to give the father a life interest in the produce of the sale; that sale could not comprise the father's life estate, because the power did not extend over it. When, therefore, the deed speaks of the produce being held upon the uses and trusts thereinbefore declared, I must consider it as applying only to the uses and trusts, which would be affected by the sale; that, I think, is clear upon the settlement, and it is only a difficulty in conveyancing.

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But supposing it to be otherwise, and that this deed does not carry out the articles, or regulate the rights of the parties, another question might arise. The case of *Durnford v. Lane* (1), and that class of cases decide, that though in the case of marriage articles, executed by the wife while under *age, she is not bound, still the husband cannot join with the wife, when she comes of age, in varying the articles. So far, therefore, the articles of 1801 must be regarded as the binding instrument. That question does not, however, arise here, because I am not called upon to decide upon the rights of the purchasers; I am not obliged to consider whether

the purchasers have or have not a good title, but whether the sale was properly made or not, with a view to the question of the breach of trust. I am of opinion that there was not any breach of trust committed by the exercise of the power of sale; I think that the remainder might properly be sold under this power, and if so, there could not have been a more desirable opportunity to sell, than the period that was chosen, when the tenant for life was willing to concur in the sale, and when the prices of land ran so high; besides, there is no reason to suppose that Mr. Borrowes intended to sacrifice the property; he was the proprietor of another portion of the property, and it was his interest that all should be sold at the highest price. If the sale had been at an undervalue, he himself would have been a proportionate sufferer. There can be no doubt, I think, that the sale was a prudent one.

In the conveyances to the purchasers there is much to be regretted; by keeping back the settlement a wrong has been done to the purchasers; to say the least, a great irregularity has been committed, and the purchasers have great reason to complain; but I do not think there is the slightest ground for imputing to Mr. Borrowes any blame in a moral point of view. The accounts are produced which were made out immediately after the sale; they are made out regularly, and although London solicitors were employed, Mr. Borrowes took the management of the affairs, *being a solicitor himself of great practice and knowledge; in fact, he had the principal direction of the sale. The accounts appear to be in all respects correct and regular, and the money seems to have been properly accounted for.

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It is said, and with great reason, that this sale should have been conducted by the trustees, and if this had been a recent transaction, and there had not been any intermediate conveyances, there might have been some ground for the present suit; but now many years have been suffered to elapse, and it has not been even suggested that a higher price could have been obtained, and as the produce is still forthcoming, I do not think that the plaintiff has much reason to complain. The trustees were, however, put forward in 1813 as having the title, and Colonel Leslie was then alive and unquestionably acted; the other trustee seems not to have acted. Generally speaking, where a sale has been made without the concurrence of the trustees, yet if the sale was a proper one, and the trustees have adopted it, the Court will carry it into execution. Here the sale was *bonâ fide*; the money has been received and

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accounted for, and I could not now unravel the whole transaction, because, if I were to do so, I should be obliged not only to defeat the title of the purchasers, who are not before the Court, but to direct all the purchase-money to be repaid; besides, no such relief is sought for by this bill, which only seeks to make the defendants liable for their alleged breach of trust.

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In this state of things, the money from the sale having been received, and lent, partly to the husband and partly to Mr. La Touche, upon their personal securities, there *arose a misunderstanding as to the effect of the settlement; it was supposed that the wife was entitled to a separate life estate in the property, and the application of a part of the fund to the payment of the premium upon a policy of insurance, by which the loan to the husband was secured, was brought into question. I should mention, that proceedings had been previously instituted by Mr. Blackwood, the trustee, against Mr. Brady, the husband, in consequence of the irregularity in the payment of the interest, upon a sum of money which had been lent by Mr. Blackwood to him; and the attention of Mr. Blackwood having been called, as well to this supposed claim, on the part of the wife, as also to the manner in which the trust-funds had been invested, and the consequent breach of trust, a case was prepared under the inspection of Mr. Borrowes, and laid before Mr. Blackburne, for his opinion as to the rights of the parties, and his general advice. In this case all the facts were stated as regarded the actual sale which had taken place, but the fact was not disclosed that the father had been paid a portion of the produce for his life estate; but assuming that the sale produced the value of the fee of the estate, I cannot doubt that a due proportion was allotted to the remainder. I cannot now question the correctness of the value put upon the interest of the tenant for life, which was ascertained by Mr. Morgan, the eminent actuary. The portion then fixed was paid to the tenant for life, so that, from the time of the sale up to the present moment, there has been no concealment of the real nature of the transaction. Looking at the case in this point of view, and being of opinion that the power did authorize the sale, it appears to me that I cannot now visit the defendants with the consequences of a breach of trust, although *I cannot but say, that in the management of the sale very great irregularities were committed, and such, that if the case had come recently before me, and with different parties, I might have been inclined to make a different decree.

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It appears, from the opinion on the case to which I have referred, that it was considered to be important that a compromise should be entered into. It is manifest, from the letters written by the lady, that she was making some compromise for the benefit of her father; she was of an age to form a judgment, and had, if I am to judge from her letters, full capacity to determine what was most for her interest. No attempt was made to take advantage of her, and there is not the slightest evidence to show that any misrepresentation was made. Under such circumstances she consented to a particular arrangement, by which she made a sacrifice, and obtained a benefit: for the consideration allowed to her father she released Mr. Blackwood. The deed of 1839 was manifestly prepared under the direction of Mr. Blackburne, the first advice that could possibly be obtained at the time, and by this deed, carefully perused, and in some respects altered by him, reciting the several breaches of trust which had been committed, in reference to the investment of the produce of the sale, and which certainly were breaches of trust, but not in any manner touching upon the sale of the remainder, which I have already decided not to be a breach of trust, the parties carried out the agreement into which they had previously entered, and Mr. Blackwood became thereby fully released and discharged from all responsibility. The plaintiff, at that time, chose to execute this deed, with a perfect knowledge of the *manner in which the sale had been conducted, the mode in which the funds had been disposed of, and the securities upon which they had been invested, and she accepted of those securities as they then stood. Her letters show how fully informed she was; she speaks of them with accuracy, and describes one of them as consisting of the policy; indeed I understand it now to be admitted at the Bar, on the part of the plaintiff, that no relief can be had against Mr. Blackwood; he is not guilty of fraud, or of any actual breach of trust; he was liable, no doubt, for his neglect, and was responsible from the moment when he knew what had taken place, and ought at once to have put himself into activity, but the plaintiff chose to release him, and he gave her a valuable consideration for that release.

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But it is said, why is not the plaintiff to have relief against Colonel Leslie's estate? He, no doubt, was bound in respect of the breach of trust, and he or his personal representative might have been made responsible, if the plaintiff had not estopped herself from the relief which she now seeks. I do not rely upon the

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technical ground of the release of one trustee operating as a release to the other, but I decide upon the substance and merits of the case. If two trustees are liable for a breach of trust, and the cestui que trust says to one, "I release you from all liability in respect of certain securities, and I am willing to allow the money to remain upon those very securities," the case does not rest upon mere technical grounds; if she had said to Mr. Blackwood, "I release you, but I do not intend to accept the securities, or to give up my right to make Colonel Leslie answer for his default," the question would have been a different one, and I am not called *upon to consider it. As the case stands, I think it very clear that the deed of July, 1839, operated not only as a release of Blackwood, but also as an acceptance by the plaintiff of the securities.

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It does not appear that the plaintiff has any great reason to complain; one of the securities is represented to be most desirable, the debtor being a gentleman of considerable property; and the other is secured by a policy of insurance, upon which several bonuses have been declared, exceeding considerably the sum intended to be insured. It is stated that the Insurance Office would at present give a sum of 4,000*l.* for the policy, and if the plaintiff chooses to keep the policy on foot, the sum she will receive must be much larger. The plaintiff, therefore, has suffered no damage; if she ever could have impeached the transaction, she has precluded herself from doing so by her own acts. I apprehend, therefore, that her right to relief, as against these parties, wholly fails; and the question then is, has she any right to relief against Mr. Borrowes; he was not a trustee, but he acted as her friend, and, perhaps, may be considered to have been in some sense her solicitor, but the whole transaction was carried on by the London solicitors, and there is nothing to charge him; he was but an agent, and the agent of the trustees only, and as the trustees are not responsible, how can I hold the agent to be responsible? The plaintiff, by her own acts, has precluded herself from impeaching the conduct of the principal, how then can she affect the agent?

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It would seem to be almost of course to dismiss this bill with costs, but there has been such irregularity in the *conduct of the sale, and the circumstances connected with it appear to have required so much investigation, that my opinion is I ought to dismiss the bill without costs.

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(4 Dr. & War. 485—495; S. C. 2 C. & L. 562.)

1843.

June 7.

SIR EDWARD
SUGDEN,
L.C.

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In the year 1830, the plaintiffs, who were four sisters, employed a common agent, to receive their rents and manage their estate: one of the sisters only resided in this country, and the agent acted under a general power of attorney, executed by the three who were resident abroad. In the year 1834, the agent granted to the defendant (who acted as under-agent upon the estate) a lease of sixteen acres, and executed same in the name of the four plaintiffs, "by virtue of the letter of attorney, bearing date," &c. At this period the agent was in embarrassed circumstances, and very shortly afterwards he absconded from the country. Upon a bill filed by the four sisters impeaching the lease: Held, that it could not be sustained.

THE bill in this case was filed to set aside a lease of the 23rd of May, 1834, and stated the following case:

The plaintiffs, Maria Rossiter, Catherine Rossiter, Isabella Rossiter, and Cecilia Rossiter Byrne, were the four daughters of James Rossiter, and upon his decease, as his co-heiresses, they became seised *quasi* in fee of the lands of Rosemount in the county of Wexford, which were held by their father under a lease for three lives, with covenant for perpetual renewal. In the year 1830, the *plaintiffs—three of whom, Maria, Catherine, and Isabella, resided abroad—employed Mr. John Archbold as their land-agent: and Archbold, who was a near relative of the plaintiffs, and was alleged to be a person in whom the plaintiffs reposed much confidence, having represented that a power of attorney was necessary to enable him to manage the property, a power of attorney was executed on the 15th of July, 1833, by three of the plaintiffs, Maria, Catherine, and Isabella, authorizing Archbold to manage the estate, and to contract for and execute leases and other deeds which should be necessary for said purpose.

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The defendant, John Walsh, was employed as a sub-agent or assistant to Archbold; and he acted as a land-steward or bailiff, transacting matters connected with the estate, such as answering letters written to him, as being resident upon the lands, or transmitting the rents of the tenants, when it did not suit the convenience of Archbold to go to the lands in person.

The lands of Rosemount, prior to the year 1833, were held by Mr. Watson, at a rent of 4*l.* per acre. Watson, having become involved in pecuniary difficulties, gave up the possession of the lands, whereupon Walsh became tenant from year to year to about sixteen acres.

In the year 1834, Archbold executed to the defendant Walsh the lease in question: this lease bore date the 23rd of May, 1834, and

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was expressed to have been made between the four sisters of the one part, and the defendant, John Walsh, of the other part: it purported to convey to Walsh sixteen acres of the lands of Rosemount, for the term of one life, or thirty-one years, whichever should last *the longest, at the yearly rent of 64*l.*; and it contained a covenant, binding the plaintiffs, their heirs or assigns, to add ten years to the said term, if the defendant, his heirs or assigns, should at any time, during the continuance of the said term, require them so to do. The lease was executed by Archbold, "by virtue of a letter of attorney from the said Maria Rossiter, Catherine Rossiter, Isabella Rossiter, and Cecilia Rossiter Byrne, bearing date the 15th of July, 1833:" and almost immediately after the execution of the lease, Archbold, who had become embarrassed, absconded.

The bill charged that though Archbold and Walsh were in the habit of frequently communicating with the plaintiff, Cecilia Rossiter Byrne, who resided near Dublin, with respect to various proposed leases, and other matters relating to the management of the estate, yet that neither the said plaintiff, Cecilia, or any of the other plaintiffs, were, either directly or indirectly, made acquainted with the execution of the said lease: but that, on the contrary, the same was studiously concealed from them until after Archbold had left the country.

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The bill charged that the lease was made at a gross undervalue; that the lands, which were of valuable quality, being in the vicinity of New Ross, and adjoining the river Barrow, were well worth a rent of 108*l.* 4*s.*; that the part demised was situated so as greatly to prejudice the value of the remainder of the property, which consisted partly of upland and partly of pasture lands; that the defendant was fully aware of the value and circumstances of said lands; that he was acting in a fiduciary character with respect to the plaintiffs, and ought to have assisted *in protecting their interests, instead of fraudulently colluding with Archbold to take advantage of them.

The bill also charged, that the power of attorney under which Archbold acted was never executed by the plaintiff, Cecilia Rossiter Byrne, nor had she in any manner ever authorized the execution of the lease; and that both Archbold and the defendant were fully aware thereof at the time.

The bill prayed that the lease might be declared fraudulent and void: and for an account of the rents of the lands comprised

therein received by the defendant, or which without wilful default he might have received, from the time he went into possession : and that, in taking such account, the defendant might be charged with the full and utmost yearly rent which the lands might have produced, if let to a solvent tenant.

The defendant, Walsh, by his answer, admitted that he occasionally acted as land-steward or bailiff under Archbold, and in obedience to his orders, but denied that he occupied any confidential situation in relation to the plaintiffs, or filled any character which disqualified him for treating for the lease in question : he stated that he had never in any manner concealed the fact of such lease, and that, on the contrary, the plaintiff, Cecilia Rossiter Byrne, must have been fully aware of said lease having been made, inasmuch as, upon Watson's giving up the possession of the lands, he entered into the possession of the sixteen acres, as tenant from year to year, and as such, occupied the said lands at the same rent paid by Watson, with the full knowledge and consent of the plaintiff, Cecilia. The defendant by his answer admitted that the lands were *of a valuable quality, but denied that the rent reserved by the lease, which was in point of fact 4*l.* per acre, was not the full value, or that a higher rent could have been procured for same lands from a solvent tenant ; he positively denied that he gave to Archbold any consideration, pecuniary or otherwise, in order to induce him to execute the lease in question : and he submitted that this lease, thus made at full value, and executed as it had been by Archbold for three of the plaintiffs by virtue of the power of attorney, and for the fourth with her full knowledge, was a good and valid instrument.

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The evidence of the witnesses, who were examined as to value, was conflicting : but as the case was not decided upon this point, it is not necessary to refer to that evidence particularly.

With respect to the fact of knowledge of the lease by Cecilia Rossiter Byrne, the defendant gave in evidence a receipt signed by Cecilia Rossiter Byrne, for 32*l.* received from John Walsh, " being the amount of half a year's rent due to the Miss Rossiters and Mrs. Byrne, as tenant of the sixteen acres holding of the lands of Rosemount, due and ending the 1st of May, 1837."

The testimony of Archbold, who was examined on the part of the defendant, was also read to the effect that he had not any written authority from Mrs. Byrne, but that he consulted her, and communicated with her on the subject of said lease, and that

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Mr. Serjeant Warren, Mr. Brewster, and Mr. Gayer, for the plaintiffs.

[490] *Mr. Richard Moore, Mr. Martley, and Mr. George, for the defendant.*

The following cases were cited: *Harris v. Tremenheere* (1) *Lord Selsey v. Rhoades* (2), *Molony v. Kernan* (3).

THE LORD CHANCELLOR :

In this case it appears that four ladies, who are the plaintiffs, were entitled to the lands included in the lease in question. Three of them were resident abroad, and one of them, Mrs. Byrne, who was a widow, resided in this country. In 1830, upon the death of a Mr. Rossiter, who had been the agent of these ladies, one of them wrote from abroad to Mr. Archbold, who was a relation of the family, stating that it was the wish of all parties that he should act as their agent. Mr. Archbold, having been appointed agent, required, and ultimately obtained, a power of attorney to enable him to execute such leases as might be required for the judicious management of the property. This power of attorney was signed by the three sisters, who were abroad, but not by Mrs. Byrne, who, however, was in constant communication with Archbold respecting the property. In this way, Archbold represented the four sisters. He was the regularly appointed attorney of the three, and he was in fact the agent of the fourth, and they all together constituted his principal.

[*491] At this time Archbold was residing in Waterford, at *a considerable distance from the lands, and he required an under-agent to assist him. Accordingly Walsh, the present defendant, was appointed: and it appears that he filled the character, not of a mere bailiff or driver upon the estate, but of a sub-agent acting under Archbold: the letters, which have been read in evidence, show that he assumed the character of agent, communicating at times directly with Mrs. Byrne, and advising with her as to the tenants. The lands of Rosemount, of which the lease in question comprised a part, contained in the whole nearly one hundred acres, and

(1) 10 R. R. 5 (15 Ves. 34).

30 R. R. 1 (1 Bligh, 1).

(2) 25 R. R. 150 (2 Sim. & St. 41);

(3) 59 R. R. 635 (2 Dr. & War. 31).

produced, all round, about 4*l.* per acre. They had been held by a person named Watson, who had become embarrassed, and quitted the country, and Walsh (and this is a most important feature in the case), became tenant from year to year of a part of what had been so held. The amount of rent paid per acre for this portion was equal to what had been paid by Watson per acre for the whole of what he held. It is said that this valuation was unfair, inasmuch as the land which Walsh held consisted principally of lowland : whereas Watson had in addition a considerable quantity of upland, which would render the average rent paid by him for the whole more adequate to the value. It clearly was not a provident management to make such a division of the farm : the value of the upland was increased when held with the lowland, and the two should have been let together, so as to enable a man to farm to advantage ; and as to the question of value, if as a juror I were obliged to come to a conclusion upon the evidence, I should be compelled to say that the full value had not been given. Still the rent reserved is not much below the real value. Most of the witnesses seem to rest the damage upon the fact of this portion of the property having been cut out from the *rest, rather than upon any deficiency in the amount of the actual rent. It is clear, however, that the outside value was not given. But if Archbold had acted with good faith, if, with care and caution, he had acted for his employers as he would have done for himself, I do not think that the evidence of value would be deemed such as to affect the lease.

There is this peculiarity in the case, that the defendant, Walsh, was, with the knowledge of Mrs. Byrne, tenant from year to year at the precise rent which he now pays under the lease. Archbold by his evidence seeks to fix Mrs. Byrne with the knowledge of what took place, in relation to the tenancy of Walsh : but there is no evidence as to the manner in which Walsh became tenant in lieu of Watson : nor does it appear distinctly that the letting under this impeached lease was ever communicated to her. In addition to this, the lease is peculiar in its form : it is not only for a term certain, a life or thirty-one years I think, but it contains a covenant on the part of the lessors, that they will, on the demand of this party—the mere bailiff on the estate—grant an additional term of ten years more. Now where is there any mutuality in this stipulation ? There was no reason for it. No one can suggest that a smaller rent than 4*l.* per acre ought to have been obtained for the farm. Again, there is no restriction imposed upon the tenant as to

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the manner in which he should be at liberty to treat the property. Walsh, in some of his letters to Mrs. Byrne, speaks of the course of husbandry that ought to be adopted. After this, when the very heart of the land was about to be let to himself, one would naturally expect to find some covenant not to break *up the land and let it out in con-acre, and thereby reap enormous profits at the expense of the landlord: but there is no such restriction in the lease; nothing beyond the ordinary covenant to keep the demised property in good repair and condition. Can I, then, say, that this was a provident lease? Clearly not: it was a highly improvident one: but still, if granted by a party having due power, and valid at law, I could not disturb it. But is such the case here? Three of the persons interested in the property executed a power of attorney to Archbold, authorizing him to grant leases; the power, it is true, was to enable him to act in concurrence with Mrs. Byrne, for the parties were all acting together, and there was no division of interest; Archbold was as much the agent of the three as of Mrs. Byrne; but still this power of attorney was never executed by Mrs. Byrne. Archbold, when he came to deal with the property, did not assume a power over three-fourths only; he demised all; and the lease, in the witnessing part, purports to be executed by Archbold, "by virtue of a letter of attorney" from the four sisters, "bearing date the 15th of July, 1833." But he had no such power of attorney from Mrs. Byrne; and as to her, therefore, the relief sought is quite of course. How, then, is the lease to stand as against the other parties? Is it to be reformed, and three-fourths retained, or to be cancelled altogether, and the three-fourths to be redemised to the defendant? Looking at the substance of the contract, and the meaning of the parties, Archbold meant to lease the entire of the property, and Walsh to obtain a demise of the whole; but Archbold had no power to do what he assumed to do: yet he meant to do this or nothing, and the tenant, in like manner, only intended to take all. It would be injurious to the lessors to allow *the lease to operate over three undivided shares. The lease cannot operate as intended by the parties, and, therefore, having regard to the circumstances, cannot have any operation at all.

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When I look at the situation of the parties, and the time when this lease was executed; when I find that Archbold was, at that period, in pecuniary embarrassments; that within a very short time afterwards—in the following month, I believe—he left his residence in Waterford, and absconded; I must say that his conduct

prevents me from placing any confidence in his acts. When he executed the lease, he must have forgotten his power, and he, the principal agent, granted it to his under-agent, just at the moment when he was about to quit the country. Under these circumstances, I think that this is a case, in which a court of equity is bound to interfere. I do not rely upon the deficiency of value, and, therefore, I shall give no account for the time past; but my decree is, that the lease be given up to be cancelled, and that the plaintiffs be forthwith put into possession; the defendant is to pay all rent due to the day of giving up possession, and also the costs of the suit.

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PRACTICE CASES.

CURTIS *v.* MAYNE (1).

(2 Dowling, N. S. 37—41.)

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A sheriff may levy under a *fi. fa.*, the amount of his fees authorized by 7 Will. IV. & 1 Vict. c. 55 (2), although not indorsed on the writ, and he need not particularize their respective amounts in his return.

W. H. WATSON showed cause against a rule *nisi*, obtained by *Gray*, calling on the Sheriff of Bucks, to show cause why a return made to a writ of *fi. fa.*, issued in this cause, should not be quashed. The return was in this form, “by virtue of this writ, I have caused to be levied of the goods and chattels of the within named Thomas Mayne, the sum of 5*l.*, part whereof, to wit, 3*l.* 12*s.*, I have retained in my hands for poundage, levy fee, mileage, possession, and expenses of this execution, and 1*l.* 8*s.* the residue whereof I have ready to pay to the said Joseph Curtis, at the time and place within mentioned, in part satisfaction of the debt, damages, and interest within mentioned, and the *said Thomas Mayne hath no more goods or chattels, in my bailiwick whereof I can cause to be made the residue of the said debt, damages, and interest, or any part thereof, as within I am commanded.” The objection to the return was, that the sheriff was not entitled to retain in his hands any further allowance, in respect of the execution than poundage. By the stat. of 7 Will. IV. & 1 Vict. c. 55, s. 2, it was provided,

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(1) Cited and distinguished, *Sneady v. Abdy* (1876) 1 Ex. D. 299, 303, 307, 45 L. J. Ex. 803, 34 L. T. 801; and see *Smith v. Darlow* (1884) 26 Ch. Div. 605.

(2) Repealed by the Sheriffs Act, 1887 (50 & 51 Vict. c. 55), s. 39. As to fees and poundage see now s. 20 of that Act.

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that "it shall be lawful for sheriffs, or their officers concerned in the execution of process, directed to sheriffs, to demand, take, and receive such fees, and no more, as shall from time to time be allowed by any officer of the several courts of law, at Westminster, charged with the duty of taxing costs in such Courts, under the sanction and authority of the Judges of the said Courts respectively." Since that section came into operation, a scale of fees, to which the sheriff was entitled, had been jointly made by the Masters of the different Courts. To them, under the authority of the Act, the sheriff was entitled, and if the scale was examined, it would be found, that the particular expenses here set forth in the return were authorized by that scale. In *Daries v. Griffiths* (1), it was held, that the sheriff's right to poundage is not affected by the 7 Will. IV. & 1 Vict. c. 55, or the table of fees made under it. That case was a direct recognition on the part of the Court, that the sheriff had a right, under the new statute, to the expenses therein mentioned, as well as his poundage. For these reasons, it was contended, that there was no ground whatever for quashing the return.

[39] *Gray*, in support of the rule, submitted that it ought to be made absolute, on two grounds, first, because the sheriff was not entitled to levy any other expenses than his poundage, except by the authority of an indorsement on the writ of *fi. fa.*; and secondly, that if he had, an account ought to be given of what they were, with their respective *amounts on the face of the return. [He cited *Foster v. Blakelock* (2), *Woodgate v. Knatchbull* (3), and other cases.]

[41] WIGHTMAN, J. :

It seems to me that there is no sufficient ground for quashing this return. Before the passing of the 7 Will. IV. & 1 Vict. c. 55, the plaintiff might make an indorsement on the writ, enabling the sheriff to levy these expenses, but it seems to me that the statute of Victoria has entitled the sheriff to do that for himself, without the assistance of the plaintiff. By sec. 2 of that statute, it is provided, that "it shall, be lawful for sheriffs, or their officers concerned in the execution of process directed to sheriffs, to demand, take, and receive such fees, and no more, as shall from time to time be allowed by any officer of the several courts of law at Westminster,

(1) 7 Dowl. 204.

(3) 1 R. R. 449 (2 T. R. 148).

(2) 29 R. R. 258 (5 B. & C. 328).

charged with the duty of taxing costs in such Courts, under the sanction and authority of the Judges of the said Courts respectively." Then a schedule of fees was made under the sanction of the Courts in which these expenses are allowed. It seems to me, that under the words of the statute, and the meaning which the Court seems to have put upon it, that the sheriff is entitled to levy these expenses, although they are not indorsed on the writ. I think, therefore, that there is no ground for quashing the return to the writ. The present rule must, consequently, be discharged with costs.

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Rule discharged, with costs.

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(2 Dowling, N. S. 58—63; S. C. 11 L. J. M. C. 120; 6 Jur. 646.)

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The Vagrancy Act, 1824 (5 Geo. IV. c. 83), s. 4, which makes it an act of vagrancy in a parent to desert a child, applies to legitimate, and not illegitimate, children.

PEEL showed cause against a rule *nisi*, obtained by Cowling, for a *mandamus* to be directed to Daniel Maude, Esq., one of the justices of the borough of Manchester, commanding him to convict, under the provisions of 5 Geo. IV. c. 83, a single woman for running away and leaving her bastard child. It is clear, that in the 5 Geo. IV. c. 83, s. 4, the Legislature meant to include legitimate children only, for at the time of the passing of that statute, an illegitimate child could not be deserted and left chargeable. *By the 6 Geo. II. c. 31, and the 49 Geo. III. c. 68, s. 2, the burthen of maintaining a child born, or likely to be born a bastard, was thrown upon the putative father, who never had the custody of the child, but who was chargeable with a weekly sum towards its support under the 18 Eliz. c. 2, s. 2. So the law remained till the 4 & 5 Will. IV. c. 76 was passed; by the 71st section of which statute, the maintenance of a bastard child was in the first instance thrown upon the mother, and if she be unable to support it, then the putative father becomes liable. Before this enactment, the desertion of the mother would not have left her child chargeable, and such an event could not have been in the contemplation of the Legislature when the 5 Geo. IV. c. 83 was passed. But is a bastard child within the words of the Act? In legal language "child" means lawful child, especially where the child is mentioned with reference to the parent. In a deed or will, the term "children" will not include illegitimate

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children: *Bayley v. Mollard* (1) and *Harris v. Lloyd* (2) are strong authorities to that effect. The mother of a bastard son is not within the 32 Hen. VIII. c. 1, s. 8, which enables the owners of lands holden by knight's service or otherwise to dispose of two-thirds of such land for preferment of "children" (3). "For children in any law must be intended such as are lawfully begotten": Bac. Ab. tit., "Bastardy," (B). Throughout the whole body of laws which relate to the management and government of the poor, comprising a series of enactments from Elizabeth downwards, this distinction is uniformly observed. Legitimate and illegitimate children have been always kept wholly distinct by the Legislature. They are governed by different laws and subject to different rules. The term "child" being used simply to designate the former, the latter being, it is believed, without exception, described by the term "bastard child." * * *

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Cowling, contra :

The words of the 5 Geo. IV. c. 83, are of the most general and comprehensive nature, and the clauses and provisions of it commence with the words, "Every person running away and leaving his wife and children chargeable to the parish." Now these words, it is submitted, include every kind of child, whether legitimate or not. The mother, by the law of England, is the only person who is entitled to have charge of an illegitimate child during the time of nurture. It is not denied that in cases of conveyance, the word "child" means legitimate child only; but in all other cases "child" means quite as much illegitimate as legitimate. In *Rex v. Inhabitants of Hodnett* (4) bastards were held within the meaning of the Marriage Act, 26 Geo. II. c. 83, which requires the consent of the father, guardian, or mother to the marriage of persons under age, who are not married by banns. * * The present rule ought, therefore, to be made absolute.

Cur. adv. vult.

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WIGHTMAN, J. :

In the course of the Term cause was shown against a rule for a *mandamus* to Daniel Maude, Esq., one of the justices of the borough of Manchester, for the purpose of convicting a single woman under the 5 Geo. IV. c. 83, for running away and leaving her bastard child chargeable to the parish; and the question

(1) 1 Russ. & My. 581.

(3) Dyer, 345; Co. Litt. 123 b.

(2) 24 R. R. 68, 71 (1 T. & R. 310, 313).

(4) 1 T. R. 96.

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was, whether a bastard was included under the word "child" in the Act of Parliament? By the 4th section of the Act, certain persons are to be deemed rogues and vagabonds, and amongst them "every person running away and leaving his wife and his or her child or children chargeable to the parish," and it was considered, in support of the rule, that though in cases of tenure the word "child" is to be understood a legitimate child, it is not so, where the object of the law is to punish or disable. It was submitted, that the question was raised now for the first time, and that it had hitherto been considered that the penalties of the Act applied to the desertion of legitimate and not of illegitimate children. But the 5 Geo. IV. c. 83, is not the first statute in which the same, or nearly the same words are used in describing a class of persons who are to be deemed rogues and vagabonds. By the 3 Geo. IV. c. 40, s. 3, "all persons who run away and leave their wives or children chargeable to the parish" are to be so deemed; and by the 17 Geo. II. c. 5, s. 2, "all persons who run away and leave their wives or children whereby they become chargeable to the parish" are to be deemed rogues and vagabonds. In all these statutes, the words are nearly the same "wives or children," and by placing them together it would seem, without more, to indicate that the Legislature intended legitimate children and not bastards; and for nearly a century those words so used in those statutes have been so considered, as there is no instance to be found of any attempt to apply those words to illegitimate children. But it has been expressly held, in the case of *The City of Westminster v. Gerrard* (1), that a bastard was not within the 7th section of the 43 Eliz. c. 2, which enacts, "that the fathers and grandfathers and the children of every poor person unable to work shall relieve him." I am therefore disposed to think that a bastard child is not within the meaning of the word "child" as used in the Act of Parliament in question. It is no further necessary to refer to the Acts of Parliament relating to the putative fathers and mothers of bastards, than to observe that distinct provisions are made for the maintenance of bastard children, and the compelling the parents to provide for them; and that in all such statutes bastards are described in terms as such, and that in the general Poor-law Amendment Act, 4 & 5 Will. IV. c. 76, where the word "child" is used, as for example, in section 56, a legitimate child is clearly intended, and that where the word "child" is intended to have a more extensive

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signification it is expressly so declared as in section 57, by which the husband is made liable to maintain the children of the wife before marriage, whether legitimate or illegitimate. The only case referred to in the argument in support of the rule was that of *Rex v. Hodnett* (1), in which it was held that a bastard was within the meaning of the Marriage Act, 26 Geo. II., c. 33, s. 11, but the question there was not as here with respect to the meaning of the word "child," which was not used either in the 11th or the subsequent section; but whether a bastard is so strictly *filius nullius* that he could not be considered within the meaning of the statute, requiring that the marriage of a person under age by license, shall be by consent of the father, mother or guardian. That case seems to me hardly to bear upon the particular point in the present, which turns, as I have already stated, upon the meaning of the Legislature in the use of the word "child," and I therefore think that the rule should be discharged.

Rule discharged.

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REG. v. ELLIS AND GREENWOOD.

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(2 Dowling, N. S. 361—377; S. C. 12 L. J. M. C. 20; 7 Jur. 108.)

It is no objection to a rule for a *mandamus* to justices, to issue their warrant of distress for the levy of poor rates, that it includes two separate and distinct rates.

Although there are more than two magistrates at Petty Sessions, all of whom take part in a decision, by which the issuing of a distress warrant to levy poor rates is refused, it is not necessary that upon an application for a *mandamus*, all who were present and took part in the decision, should be included in the rule; but if the Court saw that any two had been selected, or that any of the justices so acting had been omitted for any improper purpose, all would be required to be joined.

Where upon an application for a *mandamus* to justices, to issue their warrant of distress to levy a poor rate, it appeared that the property, in respect of which the rate was sought to be obtained, was trust property, left by a testator for the purposes of a free school, and that one of the justices refusing to grant his warrant was a trustee of the estate; it was held, that notwithstanding his character as such trustee, he was liable to the *mandamus*.

A poor rate was made on the 8th of May, 1841, for the township of K.; W., an occupier of land in the township, having refused to pay the rate made upon him, was summoned and appeared before the justices of K., on the 26th of August; the application of the parish officers for a warrant of distress was then refused by the justices; on the 21st of September, the parish officers obtained counsel's opinion on the question of the liability of W.; on the 18th of September, a second rate was made; on the 16th of October, W. was summoned before the justices of S. in respect of both rates, but the justices being equally divided in opinion gave no decision; a

(1) 1 T. R. 96.

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new demand was then made by the parish officers of the second rate, and on the 29th of December W. again appeared on a summons before the justices of K., in respect of that rate, but they again refused to issue their distress warrant: Held, that the parish officers were not too late in applying for a *mandamus* in respect of both rates in H. T., 1842: Held also, that the magistrates of S., being equally divided in opinion upon the question of the liability of W. to the second rate, the parish officers were entitled to take the case before the magistrates of K., and that the latter had jurisdiction to act.

A testator by his will devised to the township of K., certain premises, for the maintenance of a sufficient schoolmaster for teaching children, residing within the town and parish of K., free and without any other stipend, and then said, "and it is further my desire that the town and parish of K., will exempt, free, and discharge my said messuages, &c., in K., as aforesaid, of and from the payment of all lays, taxes, impositions, and assessments:" Held, that although from the year 1713 to the year 1841, no assessment of poor rate had been imposed in respect of the premises in question, that although in 1841, a resolution of vestry was come to, by which it was determined that they should be exempted, and that although the objects of the testator had been carried out by the establishment of a free school, and the payment of a schoolmaster out of the rents and profits of the devised premises, the assent to the condition of the will, by the parishioners, did not exempt the beneficial occupier from being assessed to the relief of the poor, by the township of K., (which is an independent township, maintaining its own poor,) in respect of the same premises.

IN Hilary Term, 1842, *Baines* had obtained a rule, which called upon Mr. William Ellis, and Mr. Joseph Greenwood, magistrates of the West Riding of Yorkshire, to show cause why a *mandamus* should not issue to them, commanding them to grant a warrant of distress under their hands and seals, for levying upon the goods and chattels of Thomas Wall, an inhabitant and occupier of rateable property within the township of Keighley, the sum of 18s. 9d., in respect of a rate made for the relief of the poor of that township on the 8th of May, and also a like warrant of *distress for a further sum of 18s. 9d., in respect of a like rate made on the 18th of September, 1841.

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R. Hall now showed cause:

The rule was obtained upon the affidavits of various persons, the overseers and the collector of poor-rates for the township of Keighley, and from them it appeared, that in May, 1841, a rate of 1s. in the pound for the relief of the poor of that township, was duly made and allowed; and that Thomas Wall, an inhabitant of the township, was included in the rate, and was therein charged as occupier in respect of a house occupied by him under the trustees of the Keighley Free School, the rateable value of which was stated to be 18l. 15s.; that 18s. 9d. became due under the rate in respect

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of his occupation of those premises ; that Wall had resided in the said house with his family, and had had a beneficial occupation of the same, in respect of which he was rated from the year 1830 continuously to the present time, and that he still continued to reside in and occupy the same ; that neither Wall nor any person had been rated for many years in respect of the premises in question, in consequence of a desire expressed in the will of Mr. J. Drake, that the land upon which the said house had been erected, and which he had given to the trustees for the purposes of a Free School at Keighley, should be exempted by the town and parish of Keighley, from the payment of all lays, taxes, impositions and assessments whatsoever ; that the parish of Keighley had recently been surveyed and valued at the instance of the guardians of the Keighley Poor-Law Union, and that the property so vested in the trustees was inserted in such valuation, and was, therefore, included in the rate ; that in order to put an end to any doubt as to the liability to the poor-rate of the beneficial occupier of the said trust property, an information on oath was, on the 21st of August, laid before Mr. Joseph Greenwood, the defendant, one of her Majesty's justices of the *peace, &c., against the said Thomas Wall, and the said Wall was thereupon summoned to appear and did appear before Mr. William Ellis, Mr. Joseph Greenwood, and Mr. Edwin Greenwood, three justices, on the 25th of August, 1841, when, upon hearing the facts above stated, the said magistrates, though thereunto requested, &c., and though proof was given of Wall's refusal to pay the rate, declined to grant a distress warrant against the said Wall for non-payment thereof, and the said magistrates then indorsed a memorandum of their decision upon the information, as follows : " We, entertaining a doubt as to the legal liability of Mr. Wall to pay the rate, and inclining in favour of his exemption, refuse to grant a distress warrant for the recovery thereof, and dismiss the complaint accordingly ; " that the overseers, in consequence of this decision, took the opinion of counsel upon the question of the liability of Wall, and that the opinion, dated 20th of September, was favourable to this application. The affidavit then stated a further rate of 1s. in the pound to have been made on the 18th of September, in the same year, in respect of which, Wall was charged with a further sum of 18s. 9d. in respect of his said house, and that certain of the Keighley magistrates, being trustees of the Free School, it was deemed advisable to apply to the magistrates in Petty Sessions at Skipton, in the West Riding, in respect

of the non-payment of that rate by the said Wall ; that Wall was, in consequence, duly summoned to appear, and appeared before four justices assembled in Petty Session at Skipton, but that the Skipton magistrates, having ascertained that the case had been already before the justices at Keighley, refused to interfere ; that a demand was then made upon Wall for the second rate, and that a refusal being given, he was summoned and appeared before Mr. William Ellis, Mr. Frederick Greenwood, and Mr. Joseph Greenwood, magistrates in Petty Sessions assembled at Keighley, on the 29th of December, and that the said magistrates then again refused to issue a distress warrant against the said Wall, *upon the ground that he was not liable to pay the rate, first, because the parish had consented to accept the trust under Mr. Drake's will with the term imposed, that that should be only accepted on the property being exempted from rates ; secondly, because the parish had never demanded rates for more than a century ; and thirdly, that the original contract of exemption had been confirmed by the resolutions of a recent vestry meeting. Affidavits in answer were now produced, which stated that Frederick Greenwood, and the defendant, William Ellis, were two of the acting trustees for the management of the property devised by Mr. Drake to the parish of Keighley ; that the parish had been, from the date of Mr. Drake's death (27th of May, 1713), in the full enjoyment of the property so devised, and that during all that time, according to the belief of the deponents, the same had been exempted from the payment of all lays, taxes, and parochial assessments ; that the existing leases of the persons occupying the premises in question, were contracted for upon the understanding of such exemption ; that the rent and proceeds were applied in furtherance of the objects expressed in the will of Mr. Drake ; that the house occupied by Wall was built upon, and formed part of the property devised ; that these facts were proved before the magistrates in Petty Sessions, and were not contradicted on behalf of the overseers ; and that it was upon the construction of this part of the case that the magistrates arrived at their decision ; the affidavits further denied the alleged grounds on which the Skipton bench of magistrates had acted, and stated that there being four magistrates present at the Skipton Petty Sessions, they had been equally divided in opinion as to what should be done, and that the complaint was, therefore dismissed ; and lastly, it was stated that a vestry meeting of the inhabitants of Keighley, held on the 21st of May, 1841, convened by a notice signed by two

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churchwardens, and the assistant overseer of the said parish, and which was published at the church-door on the Sunday *preceding the meeting, it was determined by a resolution, which was carried by a majority of twenty to three, "that the property of the Keighley Free Grammar School be exempted from parochial rates according to the request of the founder, and as has been sanctioned by the parishioners." The following extract from the will of Mr. Drake was also set out in the affidavits.

"Item: I give to the township of Keighley, all those my two messuages, barns, buildings, &c. situate, lying, and being in Keighley aforesaid, in the county of York, &c., for the maintenance of a sufficient, and unmarried, and qualified schoolmaster, for teaching of children residing and dwelling within the said town and parish of Keighley, in the English, and Latin, and Greek tongues; which said schoolmaster, for the time being, shall always teach and instruct children within the said town of Keighley, free, and without any other reward or stipend whatsoever, and have the rents and profits of my said messuages, &c. yearly paid him, &c. And it is further my desire, that the town and parish of Keighley aforesaid, will exempt, free, and discharge my said messuages, &c., of and from the payment of all lays, taxes, impositions, and assessments whatsoever."

It was now contended, that the rule which had been obtained was informal; first, it sought to procure a *mandamus* to be issued in respect of two distinct and separate rates; but it was urged, that there should have been separate rules obtained in respect of each cause of complaint, for that it might happen that in one matter a good defence might be given, as that the application to the justices was too late, or otherwise; while in the other, no answer could be afforded, and thus confusion would be produced. The question of costs might very materially depend upon the answer to be made to the rule; but it was to be observed, that in a case moved as this was, even if the defendant was entitled to succeed upon one point, he could not obtain his costs upon that point, because they could not be distinguished from those which his adversary might be entitled *to be paid upon the other. Secondly, the application was directed against the wrong parties. From the affidavits it appeared, that the liability of Mr. Wall to the rate of the 8th of May, 1841, was discussed upon the complaint of the overseers, not only before the defendants, Mr. William Ellis and Mr. Joseph Greenwood, but that there was present at the same Petty Sessions, Mr. Edwin

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Greenwood, of whom, however, on this application, no notice was taken. The same observation applied also to the second hearing, upon the complaint in reference to the rate of the 18th of September, because there also the magistrates present were the two defendants and a third magistrate, Mr. Frederick Greenwood. The rule, however, ought to have been directed against all the magistrates who were present at and assisted in the hearing. It was true that the statute 43 Eliz. c. 2, s. 4, authorized the issuing a distress warrant in such a case, by two justices, but where more than two were present, the jurisdiction was vested in all, and all must be joined in any proceedings in respect of their acting or refusing to act, to the exclusion of a smaller number of them: *Rex v. Townsend* (1); *Reg. v. The Justices of Staffordshire* (2); *Rex v. Sainsbury* (3); *Rex v. Wix* (4); *Reg. v. St. Saviour's* (5); *Rex v. Sillifant* (6). * * *

As to the rateability of the property. Upon this, as well as the formal objections, the rule must be discharged. This turned upon the construction to be put upon the will of the testator, Drake; it was submitted, that upon the terms of the will, the parish had taken this property subject to a condition, exempting it from the payment of rates, which was binding upon it. But if a condition was not absolutely expressed by the will, the testator had left the adoption of the property by the parish, as a matter of election, and an election having been made, and long exercised, the term of exemption from rates was binding and indefeasible. A revocation of the election could not take place pending existing tenancies or agreements, and the parish was, therefore, estopped from making this demand. But the Court would not, at all events, upon such a state of facts, grant a *mandamus*, for it was a sufficient answer to the application that this point was fairly arguable, and that the justices, if they should grant the warrants demanded, would be *liable to actions, or that such of them as were trustees, and had entered into agreements with masters or tenants, would, by the necessary infraction of those agreements, be rendered open to proceedings in Chancery. [He also cited *Rex v. Catt* (7); *Harding v. Glyn* (8); *Foley v. Parry* (9); *Brown v. Higgs* (10).]

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(1) 1 Bott, p. 327, pl. 323.

(7) 3 R. B. 193 (6 T. R. 332).

(2) 56 R. B. 286 (10 L. J. M. C. 166).

(8) 1 Atk. 469. See 4 R. B. 334, 338.

(3) 2 R. B. 433 (4 T. R. 451).

(9) 39 R. B. 163 (2 My. & K. 138; 5 Sim. 138).

(4) 36 R. B. 545 (2 B. & Ad. 197).

(10) 4 R. B. 323 (8 Ves. 561).

(5) 7 Ad. & El. 925.

(6) 4 Ad. & El. 354.

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The *Solicitor-General*, and *Baines*, in support of the rule :

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First, as to the objection that all the magistrates who were present at Petty Sessions ought to have been included in this motion. There was no case which justified such a proposition. The case of *Rex v. Sillifant* had been misconceived. There, an application was made for a *mandamus* against Mr. Sillifant, commanding him to make an order for the payment of a church-rate, under 53 Geo. III. c. 127, s. 7, and the objection taken was, that one magistrate could not make an order under the Act, and that a second magistrate, not being shown to be willing to make the order, a *mandamus* could not go against one only. Where many magistrates were assembled at Petty Sessions, however, and any two refused to do an act which two might perform, a *mandamus* would lie against them. Under this Act of Parliament; the authority was given to two *magistrates to make the order; the two gentlemen against whom this application was made had been applied to, but they had refused, and the overseers were in consequence compelled to come to the Court. It was absurd to suppose that the rule contended for could prevail to its full extent, because, if that were so, and twenty magistrates were present at a Petty Session, and the name of any one was forgotten, that would afford a sufficient answer to such an application. Neither did the fact that this rule referred to two rates afford any ground of objection. In *Rex v. The Justices of Suffolk* (1), an appeal against four rates was held unobjectionable; and that was an analogous case.

* * Upon the merits of the case this rule must be made absolute, for neither had the will of the testator, nor the lapse of time since the levying of any rate in respect of these premises, any effect in exempting them from the rates, whilst they were in the hands of a beneficial occupier. With regard to the will, it was material to observe, that it had reference to the teaching of children residing within the town and parish of Keighley; the children were not to be the poor of the parish, nor was the particular township in which the property was situated alone to enjoy the advantages intended to be conferred. Th

Keighley was a distinct part of the parish, however, as its own poor, and the rate in question was a rate levied on the township, and not of the whole parish; and, supposing the township were to be annexed under the will, it had no operative effect as to the authority of this particular township to admit such

an exemption as was contended for. The law declared that every occupier should pay rates, and a rate omitting any one would be bad for such omission.

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ELLIS.

Cur. adv. vult.

PATTESON, J. :

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This was a rule for a writ of *mandamus* to two justices of the West Riding of Yorkshire, to issue two distress warrants for two poor rates. Several preliminary objections were taken, which I will first consider. First, it was contended that one writ of *mandamus* cannot go, commanding the justices to issue two warrants for district rates, although they are against the same person, and in respect of the same property. If this objection were to prevail, it would only have the effect of confining the present rule to one rate, and make it necessary to move for another rule as to the other, and so increase the expense. But I cannot think this to be necessary. The writ of *mandamus* might be divisible. If there were any difference in the circumstances attending the rates, they might be separately considered; the rule might be made absolute as to one, and not as to the other, and even the costs might be apportioned; and so might it be, if a return were made to the writ of *mandamus*; and, as it has been decided that four rates may be included in one appeal, *Rex v. Justices of Suffolk* (1); so I think may several rates in one writ of *mandamus*. The second objection was, that the refusal to issue the first warrant was made by the two justices against whom this rule was obtained, and a third, and the refusal to issue the second warrant was by the same two justices and another, and it is contended that the rule must be moved against all the justices who refused. The case of *Rex v. Sillifant* (2) was cited to establish this position. In that case, the rule was discharged on account of the difficulty of the question, but the Court also said *there that the objection was fatal, that the writ was moved against one, whereas two had refused. But, as was observed by the *Solicitor-General* in arguing this case, the writ was clearly wrong in *Rex v. Sillifant*, for it was to command one magistrate to

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by law cannot be done by less than two. No other was cited, nor have I been able to find any. I pointed out which might arise from the more out of several magistrates refusing an if the Court saw any such in the particular

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case before them, or had reason to suppose that the selection was made for any improper purpose, they would refuse the rule, and require all to be joined; but the motive here is obvious, viz., the avoiding a necessity of moving for two writs, by selecting those two magistrates who were common to both refusals. I think, therefore, that this is not a fatal objection. The third objection was, that Mr. Ellis was not a proper person to be selected, because he is a trustee of the lands. This I think is of no weight, he acted in the matter, and, therefore, is properly joined. The fourth objection was, that the motion was out of time as regards the first refusal: I think this is sufficiently answered by the circumstances which took place in the interval, as detailed in the affidavits. The fifth objection was, that as to the last refusal, the magistrates had no jurisdiction, because the matter was already before the bench of magistrates at Skipton; and *Rex v. Sainsbury* (1) and other cases were cited to show that where one set of magistrates have possession, as it were, of a case, others cannot interfere. This is very true as a general rule, but in the present instance, the Skipton magistrates being equally divided, had dismissed the case, and a fresh demand was made from the party rated, which makes it quite clear that the Keighley magistrates had jurisdiction. I come now to the merits of the case, and I *cannot see any real doubt about it. Assuming that the desire expressed in John Drake's will of 1713, amounts to a condition, it is one which the law will not allow to be performed, and the present inhabitants of the township of Keighley are in no way bound by the acts of their predecessors in this respect. Even if the rents were appropriated to the aid of the poor, I should think the condition void to the extent of not exempting the land, much more when it is for the maintenance of a schoolmaster, by which the poor and other inhabitants do not necessarily receive any benefit. I do not profess to determine what effect the non-performance of the condition may have on the rights of the trustees or the parish to the land in question, but I am very clear that the condition cannot legally exempt the beneficial occupier of the lands from being rated to the poor in respect of them. The devise is of certain premises to the township of Keighley, "for the maintenance of a sufficient, unmarried, and qualified schoolmaster, for teaching of children residing and dwelling within the said town and parish of Keighley in the English, Latin, and Greek tongues, which said schoolmaster for the time being shall always teach and instruct

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children within the said town of Keighley free and without any other reward or stipend whatsoever, and have the rents and profits yearly paid him at Whitsuntide and Martinmas by my executors and feoffees hereinafter named." The will then names feoffees, and provides for a succession of them, and gives them power to suspend the master for misconduct, and to make leases and other powers. It then goes, "And it is further my desire that the town and parish of Keighley aforesaid will exempt, free, and discharge my said messuages, &c. in Keighley aforesaid, of and from the payment of all lays, taxes, impositions and assessments whatsoever." It then gives the residue of his personalty to his executors, "to be by them laid out in lands to and for the use, behoof, and maintenance of such a schoolmaster as is aforesaid mentioned, to teach and instruct within the town of Keighley *aforesaid." But nothing is said about any exemption of such after purchased lands. The lands in respect of which the rates were made are not in the occupation of the schoolmaster, but of a tenant. It appears that they have never been rated. It does not very distinctly appear whether they are the lands actually devised, by the will, or lands purchased with the residue of the personalty, but I will assume that they are the lands devised by the will. There is some little confusion in the will in using the expressions town of Keighley and parish of Keighley, the township being a part only of the parish, and maintaining its own poor; but I do not think that material. I decide upon the broad ground that the assent of the inhabitants of the township immediately after the death of the testator cannot make a compact binding their successors, and that the lapse of time during which no rate has been made cannot make that valid which was not so originally. As I entertain no doubt on the subject, I think that the rule for a *mandamus* must be made absolute.

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Rule absolute.

REG. v. THE JUSTICES OF MIDDLESEX (1).

(2 Dowling, N. S. 385—387; S. C. 12 L. J. M. C. 36.)

1842.

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Where in answer to an application for a *mandamus* against magistrates, commanding them to issue distress warrants to levy a poor rate, it was suggested that the warrants would necessarily be executed within Hampton Court Palace, and that the officers of the Crown claimed that the property was exempt from the operation of such warrants, and threatened

(1) *R. v. Handsley* (1881) 7 Q. B. D. 398, 399.

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proceedings if they were executed, the Court nevertheless granted the writ, and refused to call upon the applicant parish to give the magistrates an indemnity against the consequences of any proceedings which might be taken.

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CLEASBY showed cause against a rule for a *mandamus* to be directed to the justices of the county of Middlesex, commanding them to issue their warrants of distress for levying the goods of certain persons, the occupiers and inhabitants of rateable property at Hampton, in respect of a rate made for the relief of the poor of the parish in which they resided. The property, in respect of which it was sought to have these warrants issued, was that which was comprised within the Palace of Hampton Court; the question of the liability of the property to be rated, had *been already argued and determined in Easter Term, 1842, and the magistrates, upon whom this rule had been served, were willing to issue their warrants, but having been informed that some further question would arise, the property belonging to the Crown, and that the officers of the Crown would further dispute the liability of the property to pay the rates, they sought that an indemnity might be given to them, by which they should be relieved from the consequences of any personal responsibility arising out of any new proceedings.

(WIGHTMAN, J.: It is not at all a matter of course that we call upon parties in the situation of this parish to give an indemnity.)

The magistrates were exposed to the certainty of an action, if they granted the warrants which were required of them; and it was but just that those who were interested in the result should bear the costs, of any proceedings which might be taken.

Erle, in support of the rule:

The magistrates were called upon to act in the execution of their duty, and they had assumed the responsibilities of their office when they accepted its honours. The difficulty which was anticipated might not arise. The Court had already decided that the inhabitants of the Palace at Hampton Court were liable to pay the rates; the warrants of the magistrates, therefore, would be legal, and the question to be raised might be, whether those warrants could be legally executed within the Palace? The parish at all events would not be called upon for an indemnity. He cited *Reg. v. Marriott* (1).

(WIGHTMAN, J. : If the property is rateable, there must be some mode of levying the rate. The question is, whether the magistrates are not bound to do their duty ?)

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Cur. adv. vult.

WIGHTMAN, J. :

I have considered this case, and I think *the rule must be made absolute. The Court have already decided on the validity of the rate; the ground of objection on the part of the magistrates is, that their warrant being to be executed within Hampton Court, it may possibly subject them to proceedings. The order of the magistrates would be simply to levy on the goods and chattels of the persons named in the writ. I think, therefore, the writ must go.

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Rule absolute.

THOMAS v. THE MAYOR, ALDERMEN, AND BURGESSES OF THE BOROUGH OF SWANSEA (1).

1842.

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(2 Dowling, N. S. 470—473; S. C. 12 L. J. Ex. 73.)

The town council of a borough resolved “that one hundred guineas be fixed as the salary of the town-clerk for his attendance on the business of the council and committees, and that he be paid the usual charges in defending and bringing actions.”

On motion to review the taxation of the town-clerk's bills: Held, that the Master proceeded on the right principle, in considering the salary as a remuneration for all business, except the bringing and defending actions.

THIS was an action for work and labour as an attorney and solicitor. On the 1st of January, 1836, the plaintiff was appointed town-clerk of the borough of Swansea, and at a meeting of the council of the borough, on the 5th of February, 1836, it was resolved, “that the sum of one hundred guineas be fixed as the salary of the town-clerk, for his attendance on the business of the council and committees in Swansea, and that he be paid the usual charges and expenses in defending or bringing actions, &c.” The plaintiff's claim consisted of twelve bills of costs for business done by him for the corporation. These bills having been referred for taxation,

In bill, No. 1, the following charges in respect of the revision of the burgess list were disallowed.

(1) Cf. *R. v. Prest* (1850) 16 Q. B. 32, 20 L. Q. B. 17; and see note to *Jones v. Mayor of Carmarthen* (1841) 58 R. R. 826.

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Writing letters requesting overseers to bring in their list of
burgesses,

Making fair copies of same lists,

Town-clerk and his clerk attending revision Court on revising lists,

Drawing out and alphabetically arranging ward lists,

Fair copy thereof,

Fair copying same into a book,

Fair copy for printer.

The only charges allowed were payments made, and poll clerks
attending elections, at 1*l.* 1*s.* each.

In bill, No. 2, which contained charges in respect of the election
of councillors, the following were disallowed :

[471] Drawing notice of the election,

Copying burgess lists into two books for poll books,

Attending at the election,

Drawing notice to councillors of their election, and getting
same printed,

Writing to councillors requesting them to qualify.

The only sums allowed under this head were the payments
actually made.

Of the charges in respect of the election of assessors and
auditors, the following were disallowed :

Notice of the election,

Copying ward lists into books for poll books,

Town-clerk and his clerk attending the election,

Drawing notice of persons elected to publish in newspaper,

Writing to inform auditors and assessors of their election.

And the Master allowed only payments made.

In bill, No. 3, consisting of miscellaneous items, the following
charges were disallowed :

For a return required by the Secretary of State of the number
of persons qualified to vote for a member of Parliament, and
for councillors,

Drawing, copying and engrossing a proposed bye-law, and
putting same on town-hall door,

Fifteen notices to quit.

This latter item was disallowed, on the ground that it was
not in fact given by the town-clerk, but by the receiver of the
corporation whose business it was.

A return required by the Secretary of State of the overseers
whose duty it was to prepare lists of voters.

The Master disallowed all charges for business done in respect of duties which the plaintiff, as town-clerk, was required to perform by the Municipal Corporation Act, the Master considering that such charges were included in the salary of 105*l.* per annum.

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V. Williams had obtained a rule, calling on the defendants *to show cause “why the Master should not review his taxation of the plaintiff’s bills of costs in this action, and state the amount of each class of items disallowed, reserving the question of their being paid for by the salary for a jury or a special case.

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Crompton and Cowling showed cause :

The taxation proceeded on the principle laid down in *Jones v. The Mayor of Carmarthen* (1). In that case the town-clerk had no fixed salary, yet the Court held that he was not entitled to recover for fees in respect of duties imposed on him, either by the Reform Act, or the Municipal Corporation Act. The 16th section of the 5 & 6 Will. IV. c. 76 (2), (The Municipal Corporation Act,) enacts, “that in any borough in which there shall be no town-clerk, or in which the town-clerk shall be dead or incapable of acting, all matters by that Act required to be done, by and with regard to the town-clerk ; shall be done by and with regard to the person executing duties in such borough, similar to those of the town-clerk, and if there be no such person, or if such person shall be dead or incapable of acting, then with regard to such fit person as the mayor of such borough shall appoint in that behalf.” The Master is the proper person to tax the bill, and the plaintiff should have pointed out to him the specific items objected to. All the charges which the plaintiff is entitled to make as an attorney, are allowed, and the Master has disallowed such only as are required by the Act to be done by the town-clerk.

Erle and V. Williams, in support of the rule :

There are two classes of items, to which the Master has improperly applied the principle laid down in *Jones v. The Mayor of Carmarthen*, viz. those charges made for such service, as would be performed by a steward of the property, and the charges for work done by the plaintiff as an attorney.

(1) 58 B. R. 826 (8 M. & W. 605).

(2) Rep. 45 & 46 Vict. c. 50.

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(LORD ABINGER, C. B. : The plaintiff should have pointed out the particular items improperly disallowed.)

In the bills 3 and 9, there are items for business done as an attorney, which the Master has disallowed, on the ground that they are for duties belonging to the office of town-clerk. He has also disallowed attendance and advice on the business of the corporation not required of him by virtue of his office.

LORD ABINGER, C. B. :

I think the Master is right. He may, perhaps, have improperly disallowed some particular items, but those should have been distinctly brought before us. There can be no doubt about the correctness of the principle laid down in *Jones v. The Mayor of Carmarthen*, and the Master has acted upon it. The salary of one hundred guineas was given as a remuneration for business to be done, and was not exclusively confined to the business of a town-clerk.

PARKE, B. :

I am of the same opinion. Upon reading the affidavits, it is perfectly clear, that the Master has proceeded on the true principle. The case depends, first, on the construction of the Municipal Reform Act, about which there is no doubt; and, secondly, on the construction of the resolution, the meaning of which is, that all business, except defending and bringing actions, is to be paid for by an annual salary of one hundred guineas. The rule ought to be discharged.

GURNEY and ROLFE, Barons, concurred.

Rule discharged.

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REG v. EDWARD ROGERS, Esq., AND OTHERS (1).

(2 Dowling, N. S. 673—676; S. C. 12 L. J. M. C. 50.)

Where magistrates have taken the examination of a pauper brought before them with a view to an order of removal being made, but have refused to make such order, on the ground of the examination disclosing a settlement in the applicant parish, the Court will not, on a suggestion that the refusal is founded upon erroneous grounds, grant a writ of *mandamus* to the justices, to compel them to make such order.

J. E. DAVIS moved for a rule, calling on Edward Rogers, Richard Price, Esquires, and James Richard Brown, David

(1) Cp. *R. v. Blanshard* (1849) 13 Q. B. 318, 18 L. J. M. C. 110.

Rodney Murray, and John Price, clerks, justices of the peace for the city of Radnor, to show cause why a writ of *mandamus* should not issue to them, commanding them, or any two of them, to take the examination of John Jones, a pauper, chargeable to the parish of Llanfihangel Rhydithon, in the said county, touching the last legal place of settlement of himself, his wife, and children; and thereupon, if it should appear that the last legal place of settlement of the said John Jones and family was in the parish of Blethvaugh, in the same county, to grant an order for the removal of the said pauper, his wife and children, to the said parish. From the affidavits upon which the motion was founded, it appeared that the pauper, with his wife and eight children, had become chargeable to the parish of Llanfihangel Rhydithon, where they were residing in the month of October, 1842. On the 3rd of November, the pauper, John Jones, was taken before the magistrates named, who were assembled in Petty Sessions at Knighton, in order that his examination might be received; and the examination having been reduced to writing by the clerk of the justices, the pauper was sworn thereto by Mr. Rogers and Mr. R. Price. From the examination, it appeared that in 1818 the pauper rented a farm, house, &c. in the parish of Blethvaugh, at an annual rent of 16*l.*; that he occupied and paid rent for the same during a period of nineteen years; that in 1837 he occupied a house and lands in the parish of Llanfihangel Rhydithon for five years; that he paid no rent, but that he paid all levies and taxes for the same; that in the course of such five years he served the office of overseer of the poor of the parish, and that during that year he paid from 12*l.* to 15*l.* *for parochial rates. This examination having been taken, the magistrates expressed a desire to postpone the consideration of the case, and no objection being offered, it was accordingly adjourned until the next Petty Sessions, which were to be held on the 1st of December following. On that day the overseer of the applicant parish again appeared before the justices, but Mr. R. Price, and the Rev. J. Price then informed him that they and their brother magistrates had determined not to make any order for the removal of the pauper and his family, for that having considered the examination, they were of opinion that there was disclosed upon the face of it a settlement in the parish of Llanfihangel Rhydithon, by payment of parochial rates, and by serving the office of overseer, subsequent in date to that which was shown to have been gained in the parish of Blethvaugh. Upon a subsequent day, the application was renewed by the

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attorney of the parish, but without success, the magistrates declining to review their decision. It was now submitted that a settlement in the parish of Blethvaugh was clearly disclosed in the examination, and that there was nothing stated therein which showed any settlement in the applicant parish. In order to establish a settlement since the 4 & 5 Will. IV. c. 76, s. 66, by renting a tenement, there must be not only an occupation, but a payment of rent to the amount of 10*l.* at the least, and also an assessment to the poor-rate, and payment of the same for one whole year. In the supposed evidence of the settlement in the parish of Llanfihangel Rhydithon, by renting a tenement, there were two defects, in respect, first, of the non-payment of rent; and secondly, of the assessment to the poor-rates: the suggested settlement by serving an office was obviously invalid, for by the 64th section of the 4 & 5 Will. IV. c. 76, it was expressly enacted, that no settlement should be gained by serving an office. With regard to the present application, it was submitted that the applicant parish had no remedy but a *mandamus*. The statute 13 & 14 Car. II. c. 12, s. 1 *(amended by the 35 Geo. III. c. 101, s. 1) enjoined justices of the division in which any poor person should become chargeable, to remove such poor person to his place of settlement; and it was urged, that as the law was silent as to any specific remedy to enforce the rights of parishes in the position of that of Llanfihangel Rhydithon, the Court would grant a writ of *mandamus*. If the Court should refuse the writ, that parish would be without a remedy, while on the other hand, to grant it would be to enable the two parishes to try and settle their rights, for it would be competent to the parish of Blethvaugh to appeal to the Sessions. Further, it was submitted that the magistrates were required to perform a duty of a ministerial nature only, and not of a judicial character; and there was no reason why they should take upon themselves to refuse to make this order.

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WILLIAMS, J. :

I am of opinion that the Court cannot interpose in this case, in the manner which is suggested. I do not agree in the proposition which has been advanced, that the act which the justices are called upon to perform is of a ministerial nature, for how can I call that a ministerial act, wherein persons are called upon to form a judgment upon the evidence brought before them. A writ of *mandamus*

is generally granted by this Court, where justices neglect or altogether refuse to enter upon the discharge of their duties; and if this had been the case of any two justices, or of any one justice of the peace peremptorily refusing to hear the examination of the pauper, the question would be of an entirely different nature. But there was an examination taken; and the greater part of the observations of the learned counsel in support of this application, proceed upon the erroneous construction which the justices are said to have put upon *this examination, namely, that the settlement in the parish of Blethvaugh amounts to nothing at all; and that that settlement was superseded by another subsequently gained in the parish of Llanfihangel Rhydithon. Into that judgment I cannot enter; for it appears to me that this is precisely a case in which the justices have entered upon their duty; and having done so, I cannot undertake to say that I should send back the case by *mandamus*, in order to bind them to a re-hearing. The result might be the same, for the *mandamus* would only require them to enter upon the inquiry. If I am not mistaken, the Court has said, that if justices refuse to make a poor-rate, they will direct them to do so, if there was no ground for their refusal; but they declined to direct them, by *mandamus*, to make an equal rate, because it was to be presumed that if they began their duty, they would perform it correctly (1).

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Rule refused.

TEBBUTT v. AMBLER.

(2 Dowling, N. S. 677—682; S. C. 12 L. J. Q. B. 220; 7 Jur. 304.)

Although where a demand of money payable under an award is made by a stranger, not a party to the arbitration, it must be made under the authority of a power of attorney, given by the party to whom the money is to be paid; the same rule does not apply where a demand of the execution of deeds under an award is to be made: therefore, where an arbitrator, by his award, directed the plaintiff to execute certain deeds of release and assignment, and the demand for execution was made by an agent to the defendant's attorney, but the plaintiff refused to comply with the award; the Court held, that he was liable to an attachment for non-compliance.

It is no objection, in answer to a motion for an attachment for disobedience to an award, which directs the execution of certain deeds, that it was the duty of the arbitrator to have prepared the deeds.

THIS was a rule, calling upon the plaintiff to show cause why an attachment should not issue against him for a contempt *of this

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(1) *Rex v. Burnstaple*, 1 Barnard. 137; 1 Bott. 118.

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Court, in omitting to execute three several deeds of release, assignment, and mortgage, described, pursuant to an award. From the affidavits on which the rule had been obtained, it appeared that an action having been brought by the plaintiff against the defendant, in this Court, the suit, as well as certain disputes, which were the subject of proceedings in Chancery, was referred to the arbitration and award of a member of the Bar. The award found that under and by virtue of a certain specified agreement, the defendant was entitled to a good and valid assignment of certain leasehold premises, and also to a good and sufficient mortgage on certain freehold property; it then directed the execution of deeds of assignment and mortgage; and further ordered, that the plaintiff should, at the request and the cost of the defendant, execute a release of all his right, title, and interest, in and to certain other premises: the premises being all respectively described. From the affidavits it appeared that Mr. Lake, the attorney for the defendant, having caused three several deeds of assignment, mortgage, and release, to be prepared, on the 4th of May, 1842, he sent drafts thereof to the plaintiff for his perusal; on the 18th of May, he gave notice to the plaintiff, that unless they were returned by the 26th, he should consider that he agreed to their terms; the plaintiff, thereupon, returned the draft deeds of assignment and release, in respect of both of which he required some alteration to be made. The amendment in the latter deed was of a merely formal nature, and was immediately agreed to; in respect of the deed of release, the plaintiff required an exception to be made of an underlease for eighty-seven years granted by himself; but the defendant objected to such an alteration being made, contending that he was entitled to a release of all the plaintiff's interest under the award. The plaintiff was subsequently called upon by Mr. Matthews, as agent for Mr. Lake, the defendant's attorney, to execute the deeds, but he had wholly neglected to do so.

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Humfrey now showed cause :

First, no sufficient authority on the part of Mr. Matthews, by whom the demand of execution had been made, was shown. The rule was laid down in *Tidd's Prac.* p. 837, ed. 9, that where a demand was made of the execution of an award, by a person not the party in the cause, in whose favour the award was, he must not only be authorized by a power of attorney to make such demand, but he must also give an assurance to the party called

upon, of his authority, by the production of such power, and
Laugher v. Laugher (1) bore out this view of the practice.

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(PATTESON, J.: That is so with respect to a demand of money ; does the same practice prevail in such a case as this ?)

No distinction could be drawn, in principle, between the present case, and the case of a demand of money, and the same practice must apply to both. Here it was not even the attorney of the party who made the demand, but his agent only. But, secondly, this was not a case in which it was reasonable to come to the Court for an attachment. * * * Thirdly, the questions *upon the form or effect of the deeds to be executed, should not have been left to be the subject-matter of dispute between the parties, but it was the duty of the arbitrator to have settled in what terms they should be drawn and executed: *Glover v. Barrie* (2).

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The *Solicitor-General* and *Hoggins*, in support of the rule :

The rule contended for by the plaintiff, that a party demanding the execution of an award, must be authorized by power of attorney, found an exception in an instance like the present, where money was not sought to be obtained, but the execution of instruments: Chitt. Arch. 1257, *Kenyon v. Wason* (3). Secondly, it did not lie in the mouth of the plaintiff to object to this application on any ground of want of courtesy on the part of the defendant. * * With respect to the third point, the defendant was quite willing that the case should go back to the arbitrators to settle the deeds.

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Cur. adv. vult.

PATTESON, J. :

This was a rule for an attachment against the plaintiff, for not executing certain deeds pursuant to an award. In answer, it is said, first, that the person who tendered the deeds for execution, had no power of attorney authorizing him to make the demand. The case of *Kenyon v. Wason* (3) is a direct decision that a power of attorney is not necessary in such a case, although it is where money is demanded, or anything for which a discharge is to be given, and the case of *Lodge v. Posthouse* (4) is to the same effect. This objection, therefore, cannot, I think, prevail. Secondly, it is said, that the arbitrator should have drawn the deeds himself,

(1) 1 Tyr. 352 ; 1 Dowl. 284.

(2) 1 Salk. 71.

(3) 2 Smith, 61.

(4) Lofft, 388.

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but this is not necessary, in my opinion. He has directed that the plaintiff should execute three deeds,—a release of his interest in certain premises, an assignment of a term, and a mortgage. It would be very convenient indeed to refer the matter back to the arbitrator to settle the deeds, and the defendant offered to do this upon the argument, but the plaintiff refused. I threw it out early in the discussion, that this would be desirable, and even now strongly recommend that course. Thirdly, it is said, that the plaintiff never did refuse, but I think the affidavits show that he did. He referred indeed to an attorney of the name of Berry, but that person had never been concerned in the matter, and the plaintiff is himself an attorney, and acted for himself throughout; I consider the reference a mere evasion. Fourthly, it is said, that the deeds were not properly drawn. Now, drafts were sent of all three. The assignment was returned with some alterations made by the *plaintiff, which the defendant adopted, and they are introduced into the deed tendered for execution. The mortgage draft never was returned by the plaintiff, but neither did he state any objection to it, and I think that after the time that elapsed, the defendant might reasonably consider that it was not objected to. The draft of the release was returned with no alteration, excepting an underlease made by the plaintiff for eighty-seven years. I am quite clear that he had no right to make this exception. He was ordered to release all his interest; if the underlease be a binding one, it will stand good against the defendant, notwithstanding the release of all the plaintiff's interests; if it be not a binding one, the defendant cannot be called upon to recognise it. This is so plain, that I cannot but consider the plaintiff's whole conduct as a mere attempt to evade the performance of the award, and I am of opinion, that the rule must be made absolute, but that the attachment should lie in the office for a month, to give the plaintiff time to execute the deeds, or arrange the matter with the defendant.

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Rule accordingly.

FROST AND ANOTHER *v.* HEYWOOD AND ANOTHER (1).

1843.

(2 Dowling, N. S. 801—803; S. C. 12 L. J. Ex. 242; 7 Jur. 179.)

[801]

The assignees of a bankrupt having sued a banker for money deposited with him by the bankrupt, a third party claimed the money as part of a fund which the bankrupt held in trust. On an interpleader rule, the Court ordered an action to be brought in the name of the bankrupt against the assignees, the *cestui que trust* to find security for the defendants' costs.

The affidavit in support of an interpleader rule, should show that the application was made before plea pleaded.

An interpleader rule called on the parties to appear before the Court "in order that it might exercise its jurisdiction on the adjustment of the several claims:" Held, sufficient in terms.

In this case the defendants had obtained a rule, calling on the plaintiffs and one William Slater, respectively, "to appear before the Court, on, &c., in order that the said Court might exercise its jurisdiction in the adjustment of the several claims of the plaintiff and William Slater, pursuant to the powers and authorities given in the Act of 1 & 2 Will. IV. c. 58, s. 1" (2), and directing that, in the meantime, all proceedings should be stayed. It did not appear, by the affidavit on which the rule was obtained, whether the defendants had pleaded or not.

Pashley appeared for the claimants, and objected that as the statute required the application to be made "before *plea," that fact ought to appear on the affidavits. If the defendants had pleaded, the Court had no jurisdiction.

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(LORD ABINGER, C. B.: Have you an affidavit that they have pleaded?)

It is for them to show that they have come to the Court in proper time, and the affidavits show that some time has elapsed since the plaintiffs declared.

(LORD ABINGER, C. B.: The statute does not prescribe any particular form of affidavit, and the Court are disposed to allow an amendment.)

Pashley then waived the objection. Secondly, the rule is informal; it calls on the parties to appear before the Court, but does not, in

(1) Cited by BRETT, J., *Duncan v. Cashin* (1875) L. R. 10 C. P. 554, 558, but see s. 7.
44 L. J. C. P. 225.

(2) Rep. 46 & 47 Vict. c. 49, s. 3;

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terms, call on them to state the nature and particulars of their respective claims, that the Court may adjudicate on them.

The Court considered that there was nothing in the objection.

Pashley showed cause on the merits :

It appeared that W. Slater, who was a trustee under the marriage settlement of a Mrs. Vaughan, had deposited the money, for which the present action was brought, in the hands of the defendants, who were bankers. Slater having afterwards become bankrupt, the present action was brought by his assignees, who claimed the money as his property. A claim was then made by Slater, on the ground that this was trust money, which the plaintiffs, by their affidavits, denied. Under these circumstances, the Court will not interfere, as they cannot make an order which will bar all parties, and so prevent further litigation, Mrs. Vaughan's claims being entirely of an equitable nature.

J. Henderson for the defendants :

The Courts have frequently expressed some doubt, as to whether the Interpleader Act extends to claims of a mere equitable nature. The defendants cannot, therefore, contest this matter with the cestui que trust, but ought to settle it at law with the trustee.

[*803] (ALDERSON, B. : The cestui que trust is the real *party here, and to permit the matter to be decided behind her back, would be to open a door to the greatest collusion. This proceeding by interpleader rule is a substitute for a bill in equity.)

Crompton, for the plaintiffs :

The case resembles that of a fraudulent preference by a bankrupt. The Court cannot interfere in cases of mere equitable claims ; besides, a bill of interpleader would afford the advantage of the additional evidence of the cestui que trust.

LORD ABINGER, C. B. :

We think we can do justice by the following arrangement. There must be an issue to try whether this money is the property of Mrs. Vaughan or not. Slater to be the plaintiff, and his assignees the defendants. Then, as Slater is a bankrupt, he ought to find security for costs, and as Vaughan and his wife

are the parties beneficially interested, they ought to be responsible. It is very improbable that they will sue a bankrupt trustee in equity, when they can recover their money at law, by an action brought in his name. In the mean time, the present defendants must be discharged, and their costs defrayed out of the fund in Court.

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Rule accordingly.

IN RE HEREFORD CHARITIES.
 IN RE GLOUCESTER CHARITIES.

(6 Jurist, 289—290.)

1842.
 Feb. 9.
 March 5.

Chancery.

Lord
 LYNDHURST,
 L.C.
 [289]

Municipal Corporations Act—Charity—Appointment of new trustees.

The trustees of certain borough charities, appointed by the LORD CHANCELLOR under the provisions of the Municipal Corporations Act, having by deaths and removals become diminished, in one instance, by one-third, and in another instance, by one-fourth of their original number, upon the petition of some of the inhabitants of the respective boroughs, references were directed to the Master to approve of proper persons to be appointed trustees in the place of such as had died or removed.

Upon the occurrence of one or more vacancies in the number of such trustees, it is not of course that the Court should accede to an application to fill up the same, but the Court will exercise its discretion in regard thereto on a consideration of the circumstances affecting each case.

Notice of an intended application for the appointment of new trustees of such charities, is to be given to the surviving or continuing trustees.

THE petitions in these cases were for the appointment of new trustees of certain charities in the boroughs of Gloucester and Hereford respectively, in the place of such of the trustees originally appointed by the LORD CHANCELLOR under the provisions of the Municipal Corporations Act, as had since died or ceased to reside in the neighbourhood of those towns. The petitions, in both cases, were presented by certain of the inhabitants, and being for the same object, and the same counsel being engaged in each, were for convenience' sake heard by the LORD CHANCELLOR at the same time. In each case there were several charities to be administered by the trustees; and in the case of *Hereford* nineteen trustees had been appointed in August, 1836, of whom five were dead, and one was resident abroad, without any intention of returning. Upon the original application for the appointment of those trustees, affidavits were made by the parties applying, in which it was stated that that number of trustees was requisite, in order to insure a sufficient attendance at the meetings to be holden for the

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purpose of managing and administering the funds of the charities. The present application was opposed by a portion of the surviving trustees, and an affidavit was made by the clerk to the trustees, stating, that no deficiency was experienced of persons attending at the meetings for the transaction of business; but, it appeared, that the quorum of seven, at first required by the rules and regulations of the body of the trustees to be present, in order to constitute a meeting for the transaction of business, had been subsequently reduced to the number of five. In the *Gloucester* case twenty-one trustees had been appointed, of whom two were dead, and three had ceased to be resident. A minority of the surviving trustees opposed the application; and it was stated, in the affidavits on their part, that the income of the charities had increased under the existing management, and that no difficulty was found in procuring a sufficient attendance at the meetings of the trustees. Five of the surviving trustees appeared by counsel, and supported the prayer of the petition.

Feb. 9.

Upon the Gloucester petition being opened, an objection was taken on the part of the surviving trustees, to its being heard as an *ex parte* application; and it was contended, that notice of the petition ought to have been served upon them, that they might have an opportunity of appearing upon it. The LORD CHANCELLOR acceded to the objection, saying, it was not of course to appoint a new trustee on the death of one, but that it was in the discretion of the Court to do so or not; and that it was desirable that the Court should have as much information as possible to enable it to exercise its discretion; and he accordingly directed that the clerk of the trustees should be served with the petition.

March 5.

Notice having been given by the petitioners in both cases, the two petitions now came on to be heard.

Girdlestone and *Barlow*, in support of the Hereford petition:
and

Girdlestone and *Cotter*, in support of that from Gloucester.

Elderton, for five of the surviving trustees of the Gloucester charities, also in support.

G. Richards and *Blunt*, *contra*.

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I do not feel that I am called on in this case to state what diminution in the original number of trustees will justify the Court in interposing for the purpose of supplying the places of those who are dead, or those who have retired from the discharge of the duties of their office. In this case, it does not appear that the application is opposed, in either instance, by the majority of the trustees; and, upon adverting to the affidavits, it appears that the founders of these charities contemplated that they should be administered by even a greater number of trustees, than was appointed upon the report of the Master. I conceive, therefore, in keeping up, as far as we can keep up, the original number of the trustees, we are acting in unison with the will of the founders. Now, in the first instance, in the case of the *Hereford Charities*, the parties seem to me to have decided against themselves. They considered, in the first instance, what number would be proper to constitute a meeting for the purpose of discharging the duties which were imposed upon them by the appointment, and they fixed that number at seven. They afterwards found that it was impossible for them to keep up that number. They state that, in consequence of the death of some of the parties, and the retirement of others, the numbers were so reduced, that they were under the necessity of reducing the quorum to five, having, in the first instance, considered that seven was the proper quorum; and having, in consequence of the death and retirement of members, reduced that number to five, they appear to me to have decided as to the propriety of keeping up, as far as possible, the original number. Now, what is the effect of a quorum of five? The effect of a quorum of five is, that the whole administration of these charities may be vested in the hands of the three constituting the majority of five at each meeting. It is said, there has been no abuse of these charities; and that, because there has been no abuse, the Court ought not to interfere. I am of opinion the Court ought to interfere, for the purpose of guarding against the possibility of abuse; and that the number who actually attend to discharge the duties of this office, is too small to afford that security which the Court would require. These observations apply to the case of the *Hereford Charities*. The observations as to the case of the *Gloucester Charities* arise out of the original affidavit, which was made by the parties who are now opposing the present application. They say, that the number of twenty-one persons is at least essential to the proper

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administration of the charity ; and they refer to the average number of those by whom the charities were administered before the alteration took place in the constitution of the corporation. I think, therefore, under these circumstances, they having committed themselves in this strong manner, by words so emphatic, as to say, that that number at least was essential for the proper administration of a charity, that they cannot now be allowed to come into a court of justice, and say that that number can be reduced to five without inconvenience, and without danger to the due administration of the charity. I am of opinion in this case, therefore, that the two petitions ought to be granted. I must, however, express my wish *thus publicly, that parties will not come prematurely to the Court for the purpose of supplying vacancies. Here, in the one instance, there is a diminution of one-third, and in the other, a diminution of one-fourth, accompanied also by peculiar circumstances.

March 21.

In the case of the *Hereford Charities*.—Application was made to have the order, as drawn up by the Registrar, varied, by inserting in it the words placed below in brackets ; but it being admitted that the form sanctioned by Lord COTTENHAM, and hitherto adopted, had been strictly followed, the LORD CHANCELLOR refused the application. The order was as follows : “ Let it be referred to the Master of this Court in rotation, to approve of six fit and proper persons, to be appointed trustees of the said charity in the petition mentioned, in the place of those so dead and having quitted the kingdom as aforesaid. And let the surviving trustees be at liberty to attend before the said Master on the said reference ; (and carry in and propose the names of fit and proper persons to be such trustees.) And reserve the consideration of all previous directions, and of the costs of this application, until after the Master shall have made his report. Any of the parties to be at liberty to apply.”

1842.
Feb. 9, 10.

Chancery.
SHADWELL,
V.-C.

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ABRAHAM v. HOLDERNESS.

(6 Jurist, 290—292.)

Trustees—Payment into Court—Interest—Costs.

A testator bequeathed to each of his six grandchildren 200*l.*, and in case any of them should not have attained twenty-one at the death of the testator, he directed his trustees, who were also his executors and residuary legatees, to pay interest for the legacies of such children, after the rate of 5*l.* per cent. towards their maintenance and education. Upon differences arising between the father of the children and the trustees as to the investment of the money pending minorities, the trustees filed their bill to obtain

the direction of the Court, and for leave to pay the amount into Court: Held, that the trustees might pay the principal money into Court; and, *semble*, the trustees will not be liable to make up the difference between the dividends on the money in Court and the 5*l.* per cent.

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Semble, if the direction in the will had been for the trustees to pay interest at 2*l.* per cent., and the money was paid into Court, the legatees would be entitled to the full amount of the dividends.

EDWARD ABRAHAM, by his will, gave and bequeathed to each of his grandchildren, William, Sarah, Ann, John, James, and Esther, the sons and daughters of his daughter Christiana, the wife of Mr. James Holderness, the legacy or sum of 200*l.*; and in case any of his said grandchildren should not have attained the age of twenty-one years at the time of his decease, then the said testator directed his trustees to pay or apply interest for the legacy or legacies of him, her, or them who should not have attained that age at the time of his decease, yearly and every year, after the rate of 5*l.* per centum per annum, for and towards his, her, and their maintenance and education. And the said testator did thereby declare, that it should and might be lawful for his trustees at any time after his decease, if they should think proper so to do, to pay the said legacies, or any of them, or the interest thereof, unto his said son-in-law James Holderness, or his daughter Christiana Holderness, for the benefit of his said grandchildren; and that the receipt or receipts of the said James Holderness, or Christiana his wife, notwithstanding her coverture, should be a good and sufficient discharge or discharges for the same. The testator appointed the plaintiffs, John Abraham, Edward Abraham, and Charles A. Forrester, trustees and executors of his will, and also made them residuary legatees. The present bill was filed by them against the defendant James Holderness and his six infant children, for the purpose of having the rights and interests of the said grandchildren of the testator declared, and for leave to pay the sum of 1,200*l.* into Court. The bill stated the will of the testator, and that the plaintiffs, in execution of the trusts thereof, had set apart for the purpose of answering the said legacies, and the interest thereon at 5*l.* per cent., three several mortgage securities, amounting together to 1,300*l.*, and which carried interest at 5*l.* per cent. The bill then stated, that an application was made to the plaintiffs by the solicitor of the defendant James Holderness, for information as to the securities on which the said legacies or sum of 1,200*l.* was invested. That, upon being informed as to the nature of the securities, the solicitor of the defendant J. Holderness wrote the

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following letter, dated the 2nd August, 1837: "I am instructed by Mr. and Mrs. Holderness, on behalf of their children, to inform you, that they entirely disapprove of the securities appropriated for the legacies left by the late Mr. Abraham, as mentioned in your letter to me of the 30th June, and to say, that, unless within a month from this time the money shall be satisfactorily and properly invested, they will file a bill to compel it, and establish any other rights they may have." That several applications were subsequently made to them by the defendant James Holderness, requiring the said 1,200*l.* to be raised and paid to him on behalf of his children, and that, under the circumstances, the plaintiffs raised the said sum, and were about to pay the same to the defendant, when it was admitted by him that he did not intend to invest it, but to use and apply it for the purpose of his trade, and thereupon plaintiffs declined to make such payment without taking the advice of counsel, which the said James Holderness agreed to, and a case being stated, plaintiffs were advised, that payment to the defendant having such an admitted purpose, would be a breach of trust. The bill then stated, that the defendant J. Holderness nevertheless claims and insists, that he is entitled to receive the said legacies, and is competent to give a good and sufficient discharge for the same; and that he had threatened to take proceedings against plaintiffs to recover the same. The bill stated, that plaintiffs were unable to find any good and sufficient security for the 1,200*l.*, which should yield 5*l.* per cent., and that it has remained uninvested, but in the hands of plaintiffs' bankers, who allow 3*l.* per cent.; and it prayed, that the rights and interests of the grandchildren might be declared, and that plaintiffs might be at liberty to pay the sum of 1,200*l.*, together with the interest at 3*l.* per cent. so allowed as aforesaid, and now remaining due, into Court; and that the plaintiffs might receive thereout the costs of the suit, or such part thereof as should not be ordered to be paid by defendant James Holderness. The defendant James Holderness, by his answer, admitted, that upon being informed as to the securities upon which the said legacies were invested, he did threaten to file a bill on behalf of his children, for the purpose of having their said legacies properly secured; and also admitted that he, being informed that the plaintiffs were willing to pay the said sum of 1,200*l.* to him, upon his request, in writing, did make several requests to that effect; that the plaintiffs accordingly raised the money for the purpose of paying it over to defendant,

and that, upon defendant waiting upon plaintiffs' solicitor for the purpose of receiving the money, he inquired of defendant how he intended to apply the money; when defendant, not contemplating that the money would be in any hazard of being lost, and not being aware that he should be acting improperly in so doing, stated that he intended to apply it in carrying on the business of a woollen-draper, until his children wanted it; that the solicitor then stated, that it would be necessary to take counsel's opinion whether it would be safe to pay the money. Defendant then by his answer denied that he had ever made any application *for the payment of the money subsequently to the opinion stated in the bill to have been given by counsel; and denied that he had ever threatened to take any proceedings against plaintiffs to compel them to pay him the amount of the said legacies, or any part thereof; nor had ever insisted that he was entitled to receive the same, unless the plaintiffs had thought proper, and had been willing to pay the same to him under the power given to them by the said will. And defendant submitted, that he was not a necessary party to the present suit; but, in case he should be adjudged to be a necessary party, then, he submitted, on behalf of his said children, that the plaintiffs were able to act in the trusts of the said will without the aid and direction of the Court, and that they ought not to be permitted to pay the said sum of 1,200*l.* into Court, or, at all events, not without at the same time paying out of the assets of the said testator, the interest due upon the said sum at the rate of 5*l.* per cent., and such further sum of money, as together with the said sum of 1,200*l.* would be sufficient, when invested, to produce a clear yearly amount of interest at the rate of 5*l.* per cent. upon the said legacies; and that plaintiffs should pay the costs of the suit. The question was, whether the trustees could, by paying the money into Court, get rid of their liability to pay interest thereon at the rate of 5*l.* per cent., as directed by the will of the testator; they themselves being the residuary legatees of the will.

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Bethell and *W. R. Ellis*, for the plaintiffs. * * *

Richards and *Cankrien*, for the defendants, the infants, and the father:

The Court will take care that the infants shall receive the 1,200*l.*, and also the interest at 5*l.* per cent. as directed by the will. Here is a positive gift to the children of 200*l.* each, and

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HOLDERNESSE, ^{r.} a direction that the executors, who are also the trustees and residuary legatees, shall pay interest thereon at the rate of 5*l.* per cent., for their maintenance and education. If the fund should be paid into Court, it is plain, that the intention of the testator, in that respect, will be defeated. * * As to the question of interest, it is clear that the children are entitled to 5*l.* per cent.

(THE VICE-CHANCELLOR: Suppose the Court takes possession of the money, how can you be entitled to more interest than that usually allowed on money in Court? Does the Court ever refuse to receive the principal-money upon the executors applying? Then, if the Court receives the money, can you find any cases in which the Court made the executors pay additional interest?)

Cankrien cited *Arnold v. Arnold* (1).

(THE VICE-CHANCELLOR: That was a very different case; for there, it was a question whether the interest was not a part of the gift.)

Cankrien:

Suppose the testator directed the trustees to pay only 2*l.* per cent., and then the money was brought into Court, would you think that the children would have been entitled to the entire interest on the money in Court?

(THE VICE-CHANCELLOR: Certainly. If the Court takes possession of the principal, the party entitled to it will be entitled also to the interest.)

Bethell, in reply:

The plaintiffs in this case have acted with the greatest propriety, having set apart in the first instance securities sufficient to meet the principal, and also the interest at 5*l.* per cent. Those securities were objected to by the father of the legatees; and then the trustees raise the money for the purpose of paying it over to the father; but it then being doubtful whether it was safe to pay it to the father, they file the present bill for the

direction of the Court. The Court thinks it must receive the money; but then the other side contend, that we ought to pay interest over and above that allowed upon money in Court, so as to make up the interest at 5*l.* per cent. Surely the father should bear the costs of such unreasonable contention.

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THE VICE-CHANCELLOR :

I do not think there has been any impropriety in the conduct of the executors, though at the same time I think they have not acted rightly—in the best manner; for they should, in the first instance, when the application was made for payment of the 1,200*l.* to the father, have inquired, what it was the father intended to do with the money, in the event of its being handed over to him; but the course which they pursued was this: upon the application of the father for the payment of the money, without explaining what his intentions as to the employment of the money were, the executors proceeded to act upon the intention of complying with the father's wish, and the 1,200*l.* was actually in the hands of their solicitor, ready to be paid over to the father; then, it is stated, that an expression in the will was discovered, which rendered it doubtful whether the executors would be justified in handing over the money to the father; then the additional matter came out, upon which, I think, the executors properly refrained from paying the money to him. I do not understand, that Holderness demanded, as a matter of right, that the money should be paid to him; for, in his letter of the 8th March, 1838, he says: "I am given to understand, that I can be paid the legacies left to my children, under the will of the late Mr. Abraham, by making application to you for the same; I, therefore, hereby apply for them, &c." That appears to me to have been a mere request, and not a demand of a right. The executors then, upon the discovery being made as to the father's intention of applying the money to his own purposes, declined paying him the money. It appears to me, upon the construction *of the will, that it was a matter of discretion with the executors, whether they would pay him the money or not; but if they file a bill, and offer to pay the money into Court, I am not aware that the Court ever refuses to take the principal money; and, I consider, that the bill is filed for the direction of the Court. I do not see anything to exempt this case from the general rule, namely, that the

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ABRAHAM
HOLDERNESSE. v. residuary estate is to pay the expenses before the legacies are paid; if, indeed, the legacy had been separated from the other estate by the testator, then that legacy should bear the costs incurred in respect of it; but that is not the present case. I think that I must allow the executors to pay the money into Court, it to be invested, and the dividends paid from time to time to the defendant Holderness till the further order of the Court, the costs to come out of the residuary estate. Then, the only question that remains is, whether, if the Court takes the principal money into its own keeping, it can compel the executors to go on paying so much interest as would make up the difference between the dividends on the stock purchased therewith, and the 5*l.* per cent.? It appears to me, that when the payment of the principal has been made, the obligation to pay the interest has ceased; and the Court will not go on to compel the executors to pay other interest. But it appears to me that, if the question, as to the payment of interest, is to be decided, there must be another bill filed, for that question is not properly raised.

*Ordered as above—interest at 5*l.* per cent. to be paid to the father up to the time of paying the money into Court, the executors to pay the costs of all parties.*

1842.

March 21.

Rolls Court.

Lord
LANGDALE,
M.R.

[403]

FOWLER v. WARD.

(6 Jurist, 403.)

Appointment of guardian *ad litem* to infant defendant abroad.

OSBORNE moved that William Fowler, the father of the defendant W. F. Fowler, an infant and abroad in the East India Company's service, might be appointed guardian to defend the suit in his behalf. There was an affidavit made by the solicitor of William Ford, the proposed guardian, in support of the application, stating the nature of the suit, and that W. F. Fowler the defendant was absent from the country, and also that William Ford, the father of the defendant, was not a party to the suit, or in any way a person interested in the matters in question therein; and that the deponent verily believed that the said William Ford was, from his well-known respectability and character, a proper person to be appointed guardian to his

infant son, to defend the suit on his behalf, and that the interests of the infant defendant therein might be safely and properly intrusted to his care.

FOWLER
v.
WARD.

His Lordship made the order.

GREGORY v. FELL.

(6 Jurist, 422.)

A party who neglects to make out a burgess list under 5 & 6 Will. IV. c. 76 (1), is only liable for one penalty in respect thereof under the 48th section, and cannot be sued for a second in refusing a sight of a burgess list.

1842.

May 2.

*Court of
Eschequer.*

Lord
ABINGER,
C.B.

PARKE, B.
ALDERSON, B.

[422]

THIS was an action of debt under the Municipal Corporation Act, 5 & 6 Will. IV. c. 76, s. 48, and contained two counts: the first of which was against the defendant as a parish overseer within the borough of Lichfield, to recover the sum of 50*l.* penalty for not making out the burgess list required by the statute; and the second was for a like penalty under the same section for refusing a perusal thereof to a party having right to demand the same. The defendant having paid the penalty on the first count, judgment was entered upon it, and the case went down for trial on the second count, but the whole was afterwards turned into a special case, which now came on for argument.

Bros. for the plaintiff:

The 5 & 6 Will. IV. c. 76, s. 48, enacts, that "if any overseer of any parish wholly or in part within any borough, shall neglect or refuse to make out, sign, and deliver a list of burgesses, or if the town clerk of any borough shall neglect or refuse to receive, print, and publish such lists as aforesaid, or if any such overseer or town clerk shall refuse to allow any such list to be perused by any person having right thereunto, every such overseer and town clerk respectively, for every such offence, shall forfeit and pay the sum of 50*l.*, &c." It is submitted, that each act, viz. the refusing to make out the list, and refusing a sight of it, is a distinct offence, involving a separate penalty in each case.

ALDERSON, B.:

The only question for our consideration here is, whether these

(1) Rep. by Municipal Corporations Act, 1882, s. 5; see now s. 75 (2) of that Act.

GREGORY
C.
FELL.

are separate offences, and consequently whether the defendant is to be held liable for two offences or one. Now, it is difficult to see how he can be guilty of the second, inasmuch as it is difficult to see how a man can refuse to allow inspection of a list which does not exist. First, he is liable to a penalty because such a list does not exist; and then you want to make him pay for refusing a view of that which does not exist.

PARKE, B.:

It is evident that this offence is in the alternative.

LORD ABINGER, C. B.:

It is quite clear in this case that our judgment must be for the defendant.

Judgment for defendant.

Godson was to have argued for the defendant.

1842.
April 30.

Chancery.
Lord
LYNDHURST,
L.C.
[431]

EX PARTE FOWLER, IN RE FOWLER, A LUNATIC.

(6 Jurist, 431.)

Lunatic's estate—Advancement of daughter on marriage.

Semble, that the Court will not direct an advancement by way of outfit and additional annual allowance to be made out of a lunatic's property to his daughter upon her marriage, except upon the terms of the daughter making a settlement, to be approved by the Master, of all the property that may eventually come to her as next of kin and heir-at-law of the lunatic.

THIS was the petition of the committee, who was also the eldest son of the lunatic, stating that the only daughter of the lunatic was about to be married, and praying a reference to the Master to inquire, whether any allowance should be made to her by way of outfit, and whether any additional annual allowance should be made to the lunatic, regard being had to the circumstance of the proposed marriage.

Blunt, for the petition.

The LORD CHANCELLOR made the order prayed, upon the terms of the daughter settling what might eventually come to her as heir-at-law or next of kin of the lunatic. The Master to approve of a proper settlement.

It appeared from the books kept in the Lunatics' Office, that

similar orders had been made in two cases, one by Lord BROUGHAM, and another in *Ex parte Drummond*, 21st Nov., 1836, by Lord COTTENHAM, the reference being directed in the first instance, and then a second reference to the Master to approve of a settlement.

Ex parte
FOWLER.

SMITH v. SIDNEY.

(6 Jurist, 432.)

Practice—Motion—Production of documents.

A. and B., by their joint answer, admit certain documents to be in the possession of A. B. must be served as well as A. with notice for production of them.

1842,
March 21.
Chancery.
SHADWELL,
V.-C.
[432]

TORRIANO moved for the production of certain documents relating to a partnership between the defendants Sidney and Sherwood. The defendants put in their answers together, admitting that the documents in question were in the possession of defendant Sidney. The notice of motion for the production was only served on the defendant Sidney.

Bates, contra, objected that both the defendants ought to have been served.

The VICE-CHANCELLOR held the objection good, and that both defendants ought to have been served.

Motion refused.

BALDWIN v. TIMBRELL.

(6 Jurist, 488—489.)

The Court has no jurisdiction to entertain an appeal against an order *nisi* for a *distringas* upon stock, made by a Judge under the Judgment Act, 1838 (1 & 2 Vict. c. 110, s. 14).

Quere, if they have any in the case of an order absolute? (1)

IN this case judgment having been signed against the defendant, Lord DENMAN, Ch. J., made an order *nisi* for a *distringas* on certain stock, under 1 & 2 Vict. c. 110, s. 14; but some questions of difficulty having arisen, as to whether this was a case within the meaning of that section, the learned Judge, with a view of taking the opinion of the Court upon them, directed the parties to apply to the Court in banc to make the order absolute.

1842.
May 5.
Court of
Exchequer.
Lord
ABINGER,
C.B.
PARKE, B.
ALDERSON, B.
[488]

Watson now appeared to move accordingly.

(1) *Drew v. Willis* [1891] 1 Q. B. 450, 60 L. J. Q. B. 264, 64 L.T. 760.—C. A.

BALDWIN
v.
TIMBRELL.

(ALDERSON, B. : What authority have we to interfere in this? the statute expressly gives the power to make orders of this nature to a Judge at chambers, not as constituting part of the Court, but the substantive original jurisdiction is vested in him alone. You might as well call on us to review the discretion of a Judge at chambers in issuing a writ of *habeas corpus*.)

That is not a proceeding in any cause, whereas here final judgment has been signed in this Court; in addition to which, a *habeas corpus* is for the protection of the liberty of the subject. Besides, even assuming the Court to have no original jurisdiction, the Judge himself has referred the matter to them.

Thesiger appeared to show cause in the first instance.

[489] LORD ABINGER, C. B. :

We have certainly no jurisdiction in the present stage of the proceedings.

PARKE, B. :

It is quite clear that we have no original jurisdiction in matters of this nature, whatever we possibly might have to review the Judge's final order. You had better, therefore, go back to Lord Denman, and have the order made absolute by him.

ALDERSON, B. :

If Lord Denman finds any difficulty in dealing with the question raised, he can have the assistance of others to sit with him while he is hearing the case.

Rule refused.

EX PARTE POWELL, IN RE MOORE.

(6 Jurist, 490—491.)

1842.
March 4.

*Court of
Review.*

SIR J. CROSS.

[490]

Equitable mortgage—What a sufficient written memorandum.

Among the effects of a testatrix are found title-deeds belonging to a trader, and there is a letter written by the testatrix to her agent, directing him to advance a certain sum to the trader, and stating that the advances are made on the security of certain title-deeds and documents therein described; and at the foot of this letter the trader signs a receipt for the advances. The title-deeds found among the testatrix's effects do not answer the description in the letter; but it does not appear whether any others were deposited with her on the occasion of the loan. The trader becomes bankrupt, and the usual petition of an equitable mortgagee is presented by

the testatrix's personal representative : Held, that there was a good lien on the property comprised in the title-deeds found in the *testatrix's possession for the amount of the advances ; but that there was no sufficient memorandum to entitle the petitioner to costs.

Ex parte
POWELL.
[*491]

THE petitioner claimed to be equitable mortgagee of certain leaseholds, the title-deeds of which were in his possession, and prayed for the usual order for sale, with liberty to bid, and to prove for the deficiency. The petitioner also prayed that the costs might be paid out of the proceeds of the sale, on the ground of there being a sufficient written memorandum accompanying the deposit. The deeds, which were in the petitioner's possession, consisted of the lease of a house in the city of London, with the assignment of the lease by the lessee to the bankrupt ; and the petitioner held these documents as the only acting executor of Mary Hughes, deceased, amongst whose effects the deeds were found, and who was the mother-in-law of the bankrupt. The written memorandum relied upon was the receipt signed by the bankrupt at the foot of a letter written by the testatrix. The letter, which was addressed to a Mr. J. Woollam, was in the following words :

“ MY DEAR SIR,—I am anxious to advance Mrs. Moore 1,000*l.*, for which she will give up as security some bonds and lease of house left by her late husband Mr. Glover, and for which I shall receive 5*l.* per cent. interest. By your complying with the above request and placing the same to my account, you will greatly oblige yours, respectfully,

“ MARY HUGHES.

“ Highbury Park, March 11th, 1837.”

At the foot of this letter was the following memorandum in the handwriting of the bankrupt : “ Received of J. Woollam, Esq., on account, March, 15, 300*l.* ; 31st, 300*l.* ; April 2, 400*l.*—1,000*l.* SAMUEL MOORE.” It did not appear that the title-deeds of any leaseholds belonging to Mrs. Moore, the wife of the bankrupt, had been deposited with her mother the testatrix ; but the petition and affidavit in support of it stated the application for the loan of the 1,000*l.* was made by the bankrupt to the testatrix in March, 1837, upon the security of a deposit of the lease and assignment, together with two bonds of the Staines Bridge Company, one for 500*l.*, and the other for 200*l.* ; which the bankrupt represented to have been bequeathed to his wife by the will of her former husband. It was also stated, that these documents were actually deposited by the bankrupt with the testatrix, upon his receiving from her the above-mentioned letter addressed to Mr. Woollam in whose hands the

Ex parte
POWELL.

testatrix then had some money, and to whom the letter was carried by the bankrupt himself. It was also stated that Mr. Woollam accordingly advanced the money by instalments in the manner mentioned in the receipts at the foot of the letter. It further appeared that the petitioner had given up the bonds on its being proved to his satisfaction that, in point of fact, neither the bankrupt nor his wife took or could claim any interest in them under the will of Mrs. Moore's former husband. The petitioner, as the personal representative of the testatrix, had brought an action against the bankrupt to recover the sum of 1,000*l.* advanced, and interest, and had obtained a verdict and entered up judgment previously to the bankruptcy. The *fiat* issued on the 3rd January, 1840.

Bacon, for the petitioner :

The existence of the debt is established as well by the written receipts of the bankrupt at the foot of the letter, as by the verdict in favour of the petitioner. And as no other explanation has been given by the bankrupt of the circumstance of his title-deeds being in the possession of the testatrix, it must be assumed that they were deposited with her to secure the re-payment of this loan.

* * * * *

Randall, for the assignees :

Even if it were granted, that, in the absence of any indication of intention of the parties, the mere circumstance of some title-deeds of the bankrupt being found in the possession of the testatrix, who was his mother-in-law, would furnish a presumption that they were deposited with her as a security ; such an inference is, in this case, excluded by the letter of the testatrix herself, in which she expressly describes the property on the security of which she advanced her money, and which description clearly does not comprise the leaseholds, of which the sale is sought by this petition. * * *

Bacon, in reply.

SIR J. CROSS :

In this case it appears, that the testatrix, Mrs. Hughes, of whom the petitioner is the personal representative, advanced a sum of money upon the security of the deposit of a lease by her daughter, the wife of the bankrupt. There is no question but that the money was advanced expressly upon the security of the lease intended to be deposited. Soon afterwards the testatrix died, and in her possession was found a lease belonging to the bankrupt,

who was the borrower of the money ; and there is no evidence of any other lease whatever having been deposited with her to secure the payment of the sum advanced. There is, therefore, *prima facie* evidence that this was the lease deposited to secure the money lent to the bankrupt ; and I do not think that the letter written by the testatrix is sufficient to counteract this inference. I am therefore of opinion that the petitioner is entitled to the usual order for sale ; but I do not think the petitioner is entitled to his costs, there not appearing to me to be any sufficient memorandum for that purpose.

Ex parte
POWELL.

Ordered accordingly.

PYE v. LINWOOD.

(6 Jurist, 618—620.)

1842.

June 29.

A testatrix bequeathed a moiety of her residuary estate to her daughter E. B. O., so that the annual interest thereof should be received by her for her natural life, and upon her decease to go and be equally divided amongst all and every her children lawfully begotten ; and in case of her decease without lawful issue, then to J. O. E. B. O. married and had only one child, which died an infant in her lifetime : Held (under the old law of wills), that the *word ' then ' did not mean the instant of death of E. B. O., the mother, but death without issue generally, or without ever having had issue, and that the child of E. B. O., notwithstanding its death in its mother's lifetime, took under the will of the testatrix an absolute vested interest in a moiety of her residuary estate.

Chancery.

KNIGHT
BRUCE, V.-C.

[618]

[*619]

CECILIA ANN MORRIS, the testatrix in this cause, by her will, bearing date the 19th of May, 1821, after making certain specific bequests, bequeathed as follows : " I do hereby give, devise, and bequeath all the rest, residue, and remainder of my said estate and property whatsoever and wheresoever, unto my two children, John Orr and Elizabeth Bond Orr, in manner following ; that is to say, the one even and equal moiety or half part thereof unto my said son John Orr, his heirs, executors, administrators, and assigns, to hold unto the use of the said John Orr, his heirs, executors, administrators, and assigns for ever, and in case of his decease without leaving lawful issue, then unto the use of my said daughter Elizabeth Bond Orr, her heirs, executors, administrators, and assigns ; and the other even and equal moiety, or half part of my said estate and property, together with the reversion of the former moiety, I do hereby direct to be invested in Great Britain, in Government or other good and sufficient securities, by my executors, for the use and benefit of my said daughter Elizabeth Bond Orr, so as that the annual interest thereof shall be received and taken by her for and during her natural life, to be paid into her own proper hands for

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her sole and separate use and benefit, not subject to the control or management of her husband in case of her marriage; and upon her decease to go and be equally divided amongst all and every her children lawfully begotten; and in case of her decease without lawful issue, then to her brother the said John Orr; and I do hereby nominate and appoint James Brydon, Edward Purcell, and James Dune, executors of this my will and testament." The testatrix died leaving John Orr and Elizabeth Bond Orr, who were her two illegitimate children, her surviving. John Orr died in October, 1822, without ever having been married, or having had children. Elizabeth Bond Orr intermarried with James Pye, by whom she had an infant son, who died a few hours after his birth. Elizabeth Bond Orr died in October, 1833, and her husband in March of the same year. On the 22nd December, 1835, letters of administration of the goods &c. of the infant child of James Pye and Elizabeth Bond his wife were granted to the plaintiffs, who filed the present bill in their character of administrators to such child, against the defendant Linwood, and another defendant out of the jurisdiction of the Court, and her Majesty's *Attorney-General*, claiming to be entitled to a sum of 1,600*l.*, 3*l.* per cent. Bank Annuities, standing in the names of the defendant Linwood and James Pye. The question before the Court was, whether or not the infant child of James Pye and Elizabeth Bond his wife took under the above-mentioned will an absolute interest in such Bank Annuities.

Simpkinson and *Moore*, for the plaintiffs, contended, that it was not necessary that such child should be living at his mother's decease, to enable him to take a vested interest; but that the words of the will were quite sufficient to give him a vested interest, although he died during the lifetime of his mother, the tenant for life. They cited *Campbell v. Harding* (1), *Keely v. Fowler* (2), *Pinbury v. Elkin* (3), *Wilkinson v. South* (4).

Wray, for the *Attorney-General*, contended, that the child, having died during the lifetime of the tenant for life, the interest, which had vested in him, had become divested, there being an executory gift over to the brother of the tenant for life in case of her decease without lawful issue, an event which had happened; and that as the brother was illegitimate, the Crown was entitled to the sum in question.

(1) 37 R. R. 169 (2 Cl. & Fin. 421).

(2) 3 Br. P. C. 299.

(3) 1 P. Wms. 363.

(4) 7 T. R. 555.

Burge and Oliver appeared for the defendant Linwood.

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LINWOOD.

KNIGHT BRUCE, V.-C. :

The difficulty in the case arises from the rule leaning in favour of the construction to give validity to rather than to avoid the bequest. The rule was established by *Campbell v. Harding*, which was affirmed by the House of Lords under the name of *Candy v. Campbell* (1). If the word "then" could be held to apply to the time of the death of the daughter, the Crown would probably be entitled, as the gift over was to John Orr, an illegitimate child. Now the words here are very similar to those in *Campbell v. Harding*, namely, "in case of her decease without lawful issue, then—." The question is, whether the word "then," in point of true construction, refers to the time of the death, or to failure of issue whenever it might happen. Lord BROUGHAM, in his judgment in *Campbell v. Harding*, says, "I have stated, that the Court is bound to look at the particular devise, and not to travel out of it in order to find circumstances for restricting the generality of the terms in which the executory gift over is limited. The testator has here said, that in case of Caroline's death without lawful issue, he then wills the money to be divided so and so, and reliance is placed upon the word 'then.' But in *Beauclerk v. Dormer* (2) it is expressly laid down by Lord HARDWICKE, that, though the word 'then' in the grammatical sense is an adverb of time, yet in limitations of estates and framing contingencies it is a word of reference, and relates to the determination of the first limitation in the estate, when the contingency arises. Used in this way, 'then' is a particle of inference, connecting the consequence with the premises, and meaning 'in that event,' or 'if that happens.' It is therefore a word of reasoning rather than of time, and it is so to be understood here. In *Jee v. Audley* (3), where some stress was laid upon the word 'then,' the expression was applied in a very different way; for the property was directed to be equally divided among the children of C. 'then living;' and this accordingly brings me to the latter clause here, in which the fund in the specified event is directed to be divided between the testator's nephews and nieces who may be living 'at the time.' Now, I do not think the expression 'at the time' carries the case further than the word 'then,' understanding that word in its grammatical sense, as referring to

(1) 37 R. R. 169 (2 Cl. & Fin. 421).

(3) 1 R. R. 46 (1 Cox, 324)

(2) 2 Atk. 308.

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and marking time. The question still remains behind, at what time? Is it 'at the time of the death (in whatever event it happens) of the first taker?' or is it not rather 'at the time of the death of the first taker without issue?' I say, that, upon the authorities it is to be taken to be 'at the time of the death without issue.' 'At the time' is of itself an elliptical phrase, which recognises something to be understood; and where there is an obvious ellipsis, the *subintellectum* must be collected from what occurs before: here the antecedent is 'dying without issue.' If that is to be construed 'dying without issue at the time of the death,' the expression 'at the time' in the subsequent clause, may mean 'living at the time of the death:' but it is unnecessary to import these latter words, the meaning of the first limitation having been already ascertained without supplying them. If, on the other hand, the dying without issue is to be a dying without issue generally, then, by a parity of reasoning, the words 'at the time' in the subsequent clause, must refer to the words 'dying without issue' generally, and the question is immediately determined the other way. It is therefore impossible, according to any fair principle of construction, to carry the case further upon the expression 'at the time' than upon the word 'then' used as an adverb of time. The question then resolves itself into this—ought that expression to be construed as referring to the time of the decease, or to the time of the failure of issue? And that *again brings us round to the point from which the inquiry originally set out, that is to say, to the construction to be put upon the clause of gift itself. Indeed, it is only by a *petitio principii*, or something very like it, that the least shadow of argument can be founded upon the expression 'living at the time,' and that only by importing it into the clause from a subsequent part of the will." That is very neatly and pointedly expressed, if I may be allowed to give an opinion upon it; and that construction seems to have been adopted by the House of Lords in *Candy v. Campbell*. The gift there was "to my adopted daughter, commonly called Caroline Harding, the sum of 20,000*l.* 3*l.* per cent. Consols; but in case of her death without lawful issue, I then will the money so left to her to be equally divided, &c.," almost exactly the same as the gift in the present case, except that there Caroline Harding was the first taker, and took an absolute interest; here the mother first takes an estate for life. Adopting the construction in *Campbell v. Harding*, it appears to me, that the word "then" does not mean the instant

[*620]

of death of the mother, but death without issue generally, or without ever having had issue, or with an indefinite failure of issue, (in the last of which cases the sum in question would have gone to the Crown, as the gift would have been too remote). There was, it appears, one child, who took a vested interest which has not been displaced, the personal representative of such child therefore is entitled to his share. In deciding thus I save whole the decisions in *Keeley v. Fowler*, *Pinbury v. Elkin*, and *Wilkinson v. South*, which I have not the slightest idea of touching.

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BEATSON v. NICHOLSON.

(6 Jurist, 620—622.)

1842.
June 8, 11, 21.

Specific performance—Lease.

Chancery.

By memorandum in writing, A. granted to B. a lease for the term of three years, and agreed, upon B. giving him notice in writing within three months after the expiration of the lease, to grant him a new lease for a further term. At the expiration of the three years, B. applied to A. (but whether or not in writing did not appear) for a new lease, and the solicitors of A. and B. prepared a draft of the intended lease. In consequence of some difference as to the *terms, B. refused to accept the lease. On bill filed by A. for specific performance: Held, that B., having by his answer admitted the demand of a lease, but not having expressly set up the Statute of Frauds, was bound to accept a lease, although his demand might not have been in writing.

WIGRAM,
V.-C.
[620]

[*621]

THIS was a suit for specific performance; the bill stated, that, by a memorandum made the 4th March, 1834, between S. L. Beatson and C. M. Nicholson, S. L. Beatson demised and let unto C. M. Nicholson a house and shop, with appurtenances, for the term of three years certain, and a quarter's warning or notice to be given or left in writing by the said C. M. Nicholson at the end of the said three years; the rent thereof to commence from Lady Day then next ensuing, at and under the yearly rent of 50*l.*, payable quarterly; and C. M. Nicholson did agree to take the said house of the said S. L. Beatson for the said term, and at the said rent payable in manner aforesaid; and if after the said term of three years was expired, he the said C. M. Nicholson should be minded or desirous to have and take a lease of the said premises, with the common and usual covenants, and with covenants prohibiting certain professions or businesses therein specified from being carried on upon the premises, for a further term of seven, fourteen, or twenty-one years, at 48*l.* a year, payable quarterly; and of such his intention and desire should give notice in writing to the said S. L. Beatson

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within three months after the expiration of the said term of three years, that then he the said S. L. Beatson should and would grant him such lease for a further term of years, and at such rent payable as aforesaid ; and the costs and charges of such lease to be paid and discharged by the said C. M. Nicholson. But if, at the expiration of the three years and three months, the said C. M. Nicholson should not demand a lease on the terms therein mentioned, that then the said S. L. Beatson might give him a quarter's notice to give up and quit the said premises, and that the said C. M. Nicholson should and would, upon such notice in writing, quietly give up and quit the said premises. The bill stated, that, under and by virtue of the said agreement, the defendant entered into possession of the premises comprised therein ; and that at the expiration of the three years in the said agreement mentioned, the defendant applied to the plaintiff to grant him a lease of the said premises upon the terms in the agreement in that behalf contained, to which application the plaintiff consented ; and thereupon the defendant directed his attorney or agent to prepare a draft of such lease pursuant to the terms of the said agreement ; that the attorney prepared a draft lease, which was submitted to the plaintiff's solicitor, to approve on the part of the plaintiff ; and that after considerable discussion between the parties, the draft was altered, and a lease and counterpart were engrossed ; that it afterwards appeared, that the engrossment differed from the draft, a covenant to repair having been inserted, and that the plaintiff's solicitor erased the alterations ; the defendant then refused to execute the lease, and plaintiff executed it and tendered it to him for execution ; that the defendant had, since the negotiation for the lease, occupied the premises and paid rent to the plaintiff. The bill prayed a declaration that the defendant was bound to accept the lease of the premises so as aforesaid executed by the plaintiff, and to execute a counterpart thereof ; or if the Court should be of opinion that the defendant was not bound to accept the said lease, then that the defendant might be decreed to accept and execute a counterpart of such lease as the Court should consider the defendant was bound to accept. The defendant by his answer admitted the agreement, and said that at the expiration of the three years mentioned in the agreement, he applied to the plaintiff to grant him a lease upon the terms of the agreement ; but whether such request was made in writing, he did not remember ; and he submitted that he was at liberty to revoke such request, and that he was not bound to accept

a lease. The defendant contended, that, according to the true construction of the agreement, he had the option of claiming a lease, but that he was not bound to accept one against his will, and that this option continued, notwithstanding he might within three months have given notice of his intention to take a lease, so long at least as the relative position of the parties continued unaltered. He also insisted that his possession for the term of three years was to be referred to the agreement unconnected with the subsequent negotiations. The Statute of Frauds was relied on at the Bar by the defendant's counsel, but that defence was not in terms set up by his answer.

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Girdlestone and Hood, for the plaintiff.

S. Sharpe and Terrell, for the defendant.

SIR JAMES WIGRAM, V.-C.:

June 21.

A proposal to accept a lease for valuable consideration, and an acceptance of it in writing by the landlord, would bind both parties; and I cannot think that the formal demand (if by that test the argument might be tried) by the defendant in writing of a lease upon the footing of the antecedent agreement of the 4th March is binding on the plaintiff to grant, and not binding on the defendant to accept a lease. The antecedent agreement by the lessor to grant a lease, and the demand by the lessee, are equivalent to a proposal and acceptance of a lease. The condition of the agreement of the 4th March, shows that the plaintiff was not to be bound unless demand was made within three months. The defendant admits that the plaintiff consented to grant a lease if demanded, and that he had continuous possession of the property, pending the negotiations with respect to the terms of the lease. I cannot so construe that admission as to assume in the defendant's favour, that he would have had that possession if the relation of landlord and tenant had not been supposed by the plaintiff to exist. But I shall explain his possession by reference to that state of things which I may suppose to have existed in the mind of both parties. The rules of equity which determine the nature of those acts which constitute part performance, have no bearing on this question. The next defence made by the defendant was the Statute of Frauds. I do not see how that statute has any bearing on the case; but if it had, the rule laid down in *Spurrier*

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v. Fitzgerald (1), with respect to a defendant taking advantage of the statute, would preclude him. For the same reason, a party intending to claim the benefit of the Statute of Limitations, must do so expressly and in terms: *Chapple v. Durston* (2). I do not mean that he must claim the benefit in the very words of the statute, but he must claim it in words equivalent, so as to call the attention of the plaintiff to the circumstance that the benefit of the statute is claimed. The reason for this is explained in the case last referred to; and in the present case, so far as the defendant claims the benefit of the statute, he does not even suggest anything as to his belief of the existence of those circumstances which are necessary to bring the Act into operation. The question would be, how far those circumstances would be within his own knowledge when he gave the notice. But he makes no point by his answer, that the notice was not in writing. But it was said by the defendant, that the demand being in writing, was a condition precedent, and for the benefit of both parties, and that the plaintiff must show that it was strictly performed. This objection was met, by contending that the plaintiff might waive the benefit of the condition, so far as it was necessary, and that the defendant who omitted the notice in writing cannot, after what has passed, raise that objection in his favour. The defendant admits, without qualification, everything which was necessary to *give title to the plaintiff; he only says that he is at liberty to revoke, and not bound by his demand of a lease. The parties proceeded for more than a year on the supposition that the settlement of the draft was the only thing in dispute. Lastly, the defendant contended, that if the lease were to be forced on him, it must correspond with the terms actually agreed on by the solicitors; but he makes no such point by his answer. Both parties agree in stating, that the terms were finally settled by the solicitors. If that were so, and those terms were conformable with the agreement of the 4th of March, I see no reason why the lease should not be executed in conformity with the draft as agreed upon. The evidence on the subject is very unsatisfactory.

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Minutes of decree.—Declare that the plaintiff is entitled to a lease of the premises in question; and by consent, without prejudice to the right of appeal, refer it to the Master to settle a lease in conformity with the agreement of the 4th of March, 1834; but if

the parties do not consent, refer it to the Master to ascertain what were the terms contained in the draft agreed upon by the parties; and whether such terms were conformable with the agreement of the 4th of March, 1834. If the Master cannot ascertain such terms, or if such terms when ascertained are not conformable to the agreement of the 4th of March, 1834, then refer it to the Master to settle a lease in conformity with the said agreement. Liberty to state special circumstances. Reserve further directions and costs.

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DOE D. LORD EGREMONT v. HELLINGS.

(6 Jurist, 821—822.)

1842.
April 22.

*Queen's
Bench.*

Lord
DENMAN,
Ch. J.

PATTESON, J.
WILLIAMS, J.
WIGHTMAN,
J.

[821]

Where a lease purports to be executed under a power the terms of that power must be strictly followed; otherwise the lease will be void, even though it may be in substance more beneficial than the form prescribed.

A remainderman received rent from the lessee of a void lease, and having given notice to quit conveyed the property by virtue of a power to the lessor of the plaintiff: Held, that in ejectment the purchaser might take advantage of the notice given by the remainderman.

EJECTMENT on the several demises of Lord Egremont and Edmestone against the lessee under a power; the first demise being laid on the 1st October, 1838, the second on 1st November, 1839. The special case stated an original lease of 1788, commencing at Christmas; that the lease in question was made by the late Lord Egremont under a power of leasing, by which it was declared that a certain rent or more should be reserved, and that the lease should contain "usual and ordinary covenants," and a condition of re-entry for breach thereof; the lease of 1788, which was made by the donor of the power, reserved a rent of 1s. 4d., and a heriot or relief, being a sum of 8*l.*, payable upon the death of Jane Rush and others, "provided that living the said Jane Rush no such heriot should be demanded." The present lease reserved a rent of 22*l.* instead of the rent of 1s. 4d. and a heriot; and it did not contain a condition of re-entry for not doing suit at the Court. The case further stated that the late Lord Egremont died on the 11th November, 1837; that, on the 19th March, 1838, the present Lord Egremont, who was tenant for life, gave the defendant notice to quit at Michaelmas next, or at the expiration of the current year of the tenancy, and on 19th February, 1839, sold the property in question to Mr. Edmestone by virtue of a power of appointment contained in a deed made in June, 1836, which limited the estate in default of appointment to Lord Egremont for life, with remainder to trustees to preserve

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contingent remainders, with remainder to himself in fee. The *present Lord Egremont received a full year's rent from the defendant to Michaelmas, 1838.

Sir W. W. Follett, S.-G., for the lessor of the plaintiff:

The lease was not in accordance with the power, therefore was void on the death of the late Lord Egremont. * * The presumption from the receipt of rent by the present Lord Egremont, the remainderman, is that the tenancy commenced from Michaelmas, 1837, and that tenancy was properly determined by notice.

(PATTESON, J.: The quarter of the year would be split by law: the new tenancy would not begin before 11th November, 1837.)

If the tenancy was not determined on the 1st October, 1838, the party who purchased from Lord Egremont would be entitled to the benefit of the notice given by him. It will be objected that Mr. Edmestone does not take under an ordinary conveyance, but by virtue of the exercise of a power contained in the deed of 1836, and it is therefore to be assumed that he takes under the deed of 1836, and not under that of 1839; but either he is not bound by the tenancy created by Lord Egremont, or he is entitled to take advantage of the notice to quit given by him. Where a person takes by execution of a power, whether of realty or personalty, it is taken under the authority of that power, but not from the time of the creation of that power. The meaning that the persons must take under the power, or as if their names had been inserted in the power, is that they shall take in the same manner as if the power and instrument executing the power had been incorporated in one instrument; then they shall take as if all that was on the instrument executing had been expressed in that giving the power.

Bere, contra :

Supposing the next preceding lease to afford a criterion of what are usual and reasonable covenants, there is no essential distinction between the two. And a reasonable addition will not vitiate the lease: *Doe d. Earl of Jersey v. Smith* (1), *Hotley v. Scott* (3). Secondly, the notice to quit given by Lord Egremont in March, 1838, would not expire till Christmas, 1838. Where an unauthorized

(1) 22 R. R. 19 (5 M. & S. 467; 1 Brod. & B. 97; 2 Brod. & B. 473). (2) 2 Brod. & B. 498, n.; S. C. Lofft, 316.

lease is granted under a power, and the remainderman receives rent from the lessee, but not under a fresh lease, the lessee holds from the day of the original lease, and notice to quit on that day is proper : *Roe d. Jordan v. Ward* (1), and other cases cited in Com. Land. and Ten. 287—289. As to Edmestone's demise, he is in under the deed of June, 1836 : *Doe d. Wigan v. Jones* (2).

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(PATTESON, J. : According to *Roach v. Wadham* (3), recognised in *Bringloe v. Goodson* (4), *Milnes v. Branch* (5), the covenants by the tenant for life are gone by the appointment. See also *Isherwood v. Oldham* (6).)

Sir W. W. Follett, in reply.

LORD DENMAN, Ch. J. :

The case is so clear that we ought not to delay pronouncing our judgment. The lease being made under a power is clearly void on the two objections last stated : first, that no power of re-entry is reserved by it, and, secondly, that no heriot is reserved. It is impossible to say that the reservation of the heriot may be dispensed with, because it may have appeared to some persons to be a better mode to reserve a higher rent. Then the question is, whether the objection can be taken by the lessor of the plaintiff. I am of opinion that it can, because the case is not embarrassed by any tenancy.

PATTESON, J. :

The case is perfectly clear. The words of the power of leasing are, " there shall be reserved a certain sum or more," which cannot mean more rent equivalent to a heriot. The reservation of a larger rent will not excuse the absence of the reservation of a heriot. It is true that the heriot in the lease is not an ordinary service, and is not reserved in an ordinary way ; but still it is a heriot. Here, there are two covenants for the breach of which no condition of re-entry is reserved. *Doe d. Wigan v. Jones* (2), determined that the lien of a judgment-creditor is defeated by the execution of a power ; though perhaps that is altered by stat. 1 & 2 Vict. c. 110, s. 18, which enacts that a judgment shall operate as a charge on

(1) 2 R. R. 728 (1 H. Bl. 97).

(2) 34 R. R. 485 (10 B. & C. 459).

(3) 53 R. R. 134 (6 East, 289).

(4) 44 R. R. 832 (4 Bing. N. C. 726,

735).

(5) 17 R. R. 373 (5 M. & S. 417).

(6) 16 R. R. 305 (3 M. & S. 382).]

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lands over which the landlord the creditor has a disposing power. But here, at all events after the notice to quit has expired, no argument can be successfully raised. Lord Egremont, therefore, might have brought ejectment; and there is no reason, therefore, why Edmestone should not.

WILLIAMS, J. :

The lease of 1788 may be considered the pattern lease. If, therefore, there is a deviation from it in the lease in question, there is not a proper execution of the power. The doctrine of compensation is not allowable.

WIGHTMAN, J. :

One omission is fatal to the lease. The power requires the insertion of a condition of re-entry for non-performance of the covenants; and there are two covenants for the nonperformance of which no re-entry is reserved. *Mr. Bere* relies on the tenancy from year to year, which he says has not been properly determined. But the objection to want of notice applies to the first rather than to the second lease. When the interest of Edmestone takes effect, it is quite clear that the tenancy is properly determined.

Judgment for the lessor of the plaintiff on the second demise, and for the defendant on the first.

1842.
July 6.

Chancery.
KNIGHT
BRUCE, V.-C.
[889]

VYNER v. HOPKINS.

(6 Jurist, 889.)

Surety, discharge of.

Where there are two co-sureties, and the creditor grants a further loan to his principal debtor, and takes a new security for that and the former loan, and gives further time to him and one of the sureties only, without specially reserving his remedy against the other surety, he by so doing discharges the latter.

THE circumstances of this case were these: In October, 1835, Robert Thomas Vyner, the plaintiff's brother, having occasion to raise the sum of 85*l.* for the purpose of satisfying a certain debt on account of which he had been arrested, applied through the agency of the defendant Squiers to the defendant Hopkins for the loan of that amount, who lent him that sum on the security of a promissory note, which was to the following effect: "85*l.* LEAMINGTON, October 17, 1836. On demand we jointly and

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severally promise to pay to Mr. John Hopkins or order the sum of 85*l.*, with lawful interest thereon from the day of the date hereof. ROBERT THOMAS VYNER, CHARLES JAMES VYNER, J. A. SQUIERS:” the two last-named parties having joined in the note merely as sureties for the repayment of the money advanced thereon. In December, 1836, Hopkins demanded payment of the amount due on the note, and Robert Thomas Vyner, not being prepared to meet that demand, executed a bill of sale of a pack of hounds then in his possession, bearing date the 17th December, 1836; which bill of sale contained a proviso for making void the same on payment by Robert Thomas Vyner to Hopkins of the sum of 248*l.*, and interest thereon from the date thereof, after the rate of 5*l.* per cent. per annum, on the 17th March, 1837, and Robert Thomas Vyner thereby covenanted to pay unto Hopkins that sum and interest accordingly. The sum of 248*l.*, so secured, was made up of the 85*l.* formerly lent on the security of the promissory note, the interest due thereon, and a further advance of 152*l.* 6*s.* 6*d.*, made by Hopkins to Robert Thomas Vyner. The plaintiff was no party to the last-mentioned transaction between Robert Thomas Vyner and Hopkins, and he now filed his bill in this Court, contending that by that transaction, and under the circumstances, the defendant Hopkins had given three months’ time to Robert Thomas Vyner for payment of the amount due on the promissory note, without his the plaintiff’s privity, consent, or concurrence, and in violation of his rights as such surety; and moreover, that all liability of Robert Thomas Vyner on the promissory note became extinguished by reason of the covenant for payment on his part contained in the bill of sale, and that, accordingly, he the plaintiff, as such surety as before mentioned, became and was released and discharged from all liability in respect of such promissory note, and praying for a declaration by the Court to that effect, for the delivery up and cancelling of the note &c., or that, if the Court should be of opinion that the plaintiff was not discharged, then that an account might be taken as against Hopkins of the money he had or might have received in respect of the fox-hounds, &c., and that, in the meantime, he might be restrained from proceeding in any action at law against the plaintiff in respect of the promissory note.

Wigram and Cole, for the plaintiff, cited *Mayhew v. Crickett* (1).

(1) 19 R. R. 57 (2 Swanst. 185).

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Russell and Wood, for the defendant Hopkins :

Where there are two co-sureties, and the creditor gives time to one of them, he does not by so doing discharge the other : *Ex parte Gifford* (1).

(KNIGHT BRUCE, V.-C. : I do not understand that case as establishing any such principle.)

Here there was a security given by three, and then a new security given by one. The giving such new security by the one does not discharge the other two : *Eyre v. Everett* (2), *Dunn v. Slee* (3), *Twopenny v. Young* (4).

Bacon appeared for the other defendants.

KNIGHT BRUCE, V.-C. :

It is admitted, that there being two sureties upon a promissory note payable on demand, a farther loan took place, and a new security was given for that and the former loan, allowing a further time of three months. This transaction, however, took place between the creditor and the principal debtor and one of the sureties only, and there is no trace in the answers, that it was done on the principle, that a remedy was to be reserved against the other surety. The injunction must be made perpetual with costs against Hopkins, but I give no costs as to the other defendants.

1842.
July 29.

EX PARTE COTTON, RE NUTTER (5).

(6 Jurist, 1045—1046 ; S. C. 2 Mont. D. & D. 725.)

Court of
Review

SIR J. CROSBY.

[1045]

[*1046]

Mortgage—Trade fixtures—Order and disposition.

Upon the mortgage of certain premises consisting of a freehold tenement and brewhouse, with the vats, *plant, and other fixtures, the mortgagor remained in the occupation of the premises, and carried on the trade of a brewer in partnership upon them : Held, upon the bankruptcy of the firm, that certain additional trade fixtures, which had been erected by the partners upon the premises since the mortgage, did not pass to the assignees, but that, no intention on the part of the mortgagor to except them having been shown, they were included in the mortgage security.

THE bankrupt, James Nutter, having purchased certain premises of the petitioner for 6,000*l.*, and 1,000*l.* only having been paid in

(1) 6 Ves. 805.

(2) 2 Russ. 381.

(3) 1 Moore, 2.

(4) 3 B. & C. 208.

(5) Foll. *Cullwick v. Swindell* (1866)
L. R. 3 Eq. 249, 36 L. J. Ch. 173 ;

Climie v. Wood (1868) L. R. 3 Ex.

257, 261, 18 L. T. 609 ; affd. L. R.

4 Ex. 328, 38 L. J. Ex. 223, 20 L. T.

1012, Ex. Ch. ; dist. *Sanders v. Davis*

(1885) 15 Q. B. D. 218, 220, 54 L. J.

Q. B. 576.

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respect of the purchase-money, it was agreed between them that the remaining 5,000*l.* and interest should be secured by a mortgage of the premises to the petitioner; and accordingly, by indentures of lease and release and assignment, dated the 25th and 26th December, 1837, made between the bankrupt James Nutter of the one part, and the petitioner of the other part, the purchased premises, under the description of "the freehold messuage or tenement, situate, standing, and being in Trumpington Street, in the parish of St. Mary-the-Less, in the town of Cambridge, and also the brewing office, situate in the yard adjoining, and belonging to the said messuage or dwelling-house, and the mill-house, spirit warehouse, malt chambers, stables, chaise-house, counting-house, store-house, and corn chambers adjoining to and occupied therewith, as the same then late were in the occupation of William Steward, Benjamin Cotton, Timothy and Henry Steward, as brewers and co-partners, together with all and singular the houses, out-houses, edifices, buildings, counting-houses, barns, stables, coach-houses, granaries, yards, gardens, brewhouses, plant, and fixtures, and all other the rights, members, and appurtenants whatsoever to the said messuage or tenement, brewhouse, hereditaments, and premises thereby granted and released, belonging or in anywise appertaining, or with the same usually held, occupied, or enjoyed, and also the leasehold estate adjoining," were respectively conveyed and assigned by the bankrupt James Nutter unto the petitioner; as to the freehold estate in fee, and as to the plant and fixtures absolutely, and as to the leasehold premises for all the residue of the term therein, subject to a proviso for redemption on payment of the sum of 5,000*l.* and interest thereon. Upon the execution of the mortgage, the bankrupt and his brother Thomas Nutter, who were partners as brewers, entered upon the freehold and leasehold premises, and proceeded to carry on their trade upon them. In 1840, Thomas Nutter having retired from the firm, the bankrupt William Elliston was admitted partner in his stead, and the new firm continued thenceforward up to the time of their bankruptcy to carry on the business upon the mortgaged premises. Soon after the formation of the last-mentioned firm certain additions were made to the brewing plant and fixtures, which were also altered in various particulars, for the purpose of introducing a new system of brewing into the business. On the 21st March last a separate *fiat* was issued against the bankrupt James Nutter, and on the 20th of the same month a joint *fiat* was issued against the

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bankrupts. The assignees under the joint *fiat* having advertised for sale, among other things, those parts of the brewing plant, utensils, and fixtures which had been altered and added to since the date of the mortgage, the petitioner, whose mortgage-money still remains unpaid, presented this petition, praying that it might be declared that the petitioner was entitled as well to the hereditaments and premises, plant, vats, fixtures, and things as the same existed at the date of the mortgage, as also to the several particulars consisting of and comprising the alterations and additions made on the mortgaged premises subsequently to the date of the mortgage, and that such alterations and additions formed part of the mortgage security; and that the assignees might be restrained from selling the fixtures and things forming and comprising such alterations and additions.

Bacon, in support of the petition :

It is admitted, that the fixtures which existed upon the premises at the date of the mortgage are included in the security. The only question is, whether the alterations and additions to the fixtures since the date of the mortgage are also included in the mortgage, or whether they are to be considered as goods and chattels within the doctrine of reputed ownership.

(SIR JOHN CROSS : It may be a question whether the articles are fixtures, but that question the Court can only deal with by a reference.)

The general rule relating to the right to fixtures is that which prevails between the heir and executor, and as between them the articles in question would go to the heir. By a conveyance of a freehold house containing fixtures, where there is nothing to indicate a contrary intention, the fixtures will pass with the house and be considered as part of the freehold, and the same rule must prevail where the purchaser of an estate mortgages the estate which he has purchased. The mortgagee must in this respect be considered as a purchaser to the amount of his charge upon the estate. Personal chattels fixed to the freehold become parcel of the freehold; but if fixed by a person having a particular interest in the freehold, as a termor, and capable of removal without injuring the freehold, the termor may disunite them, but a mortgagor in possession has no such interest in the premises as will enable him to exercise this right of a tenant for years. He only holds possession of the land

by the permission of the mortgagee, who may by ejectment, without giving any notice, recover against him. In this respect his estate is inferior to that of a tenant at will. All improvements in the premises made subsequently to the mortgage must therefore be held to go for the benefit of the mortgagee.

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Anderdon and Dixon, contra :

The fixtures which have been added since the date of the mortgage were erected for the purposes of the trade. They were the joint property of the bankrupts. Their assignees are consequently entitled to them as trade fixtures removable by the tenant. They cited *Ryall v. Rolle* (1), *Penton v. Robart* (2), *Ex parte Scarth* (3), *Ex parte Broadwood* (4).

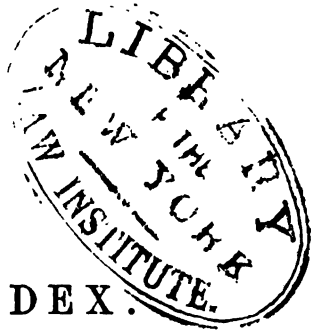
Bacon was not called on to reply.

SIR JOHN CROSS :

In this case it is admitted, that the petitioner is entitled to all the fixtures which were on the premises at the date of the mortgage; and the only question is, whether the fixtures, which have since that time been altered, as well as those which have been added to the premises, belong also to the mortgagee. The general rule of law is, that fixtures being attached to the freehold, are to all intents and purposes a component part of the entire estate; and in questions depending between a mortgagor and mortgagee, there is no distinction between trade fixtures and others. In general, all the fixtures upon the premises will be included in a mortgage of the premises, unless an intention on the part of the mortgagor to except them can be shown; and if the assignees in this case could have shown that the fixtures which have been altered, or those which have been added since the date of the mortgage, were intended to be excepted, they would have been entitled to the benefit of that exception. As however they have not done so, I am of opinion that the mortgagee is entitled to all the fixtures existing on the premises at the date of the *fiat*, whoever placed them there; but all the moveables belong to the assignee. The order was, that it should be referred to the Commissioner to inquire what were or were not fixtures at the date of the bankruptcy, without regard to the question whether they were trade fixtures or not.

(1) 1 Ves. 348; 1 Atk. 165.
(2) 6 R. R. 376 (2 East, 88).

(3) 1 Mont. D. & D. 240; 4 Jur. 827.
(4) 1 Mont. D. & D. 631.



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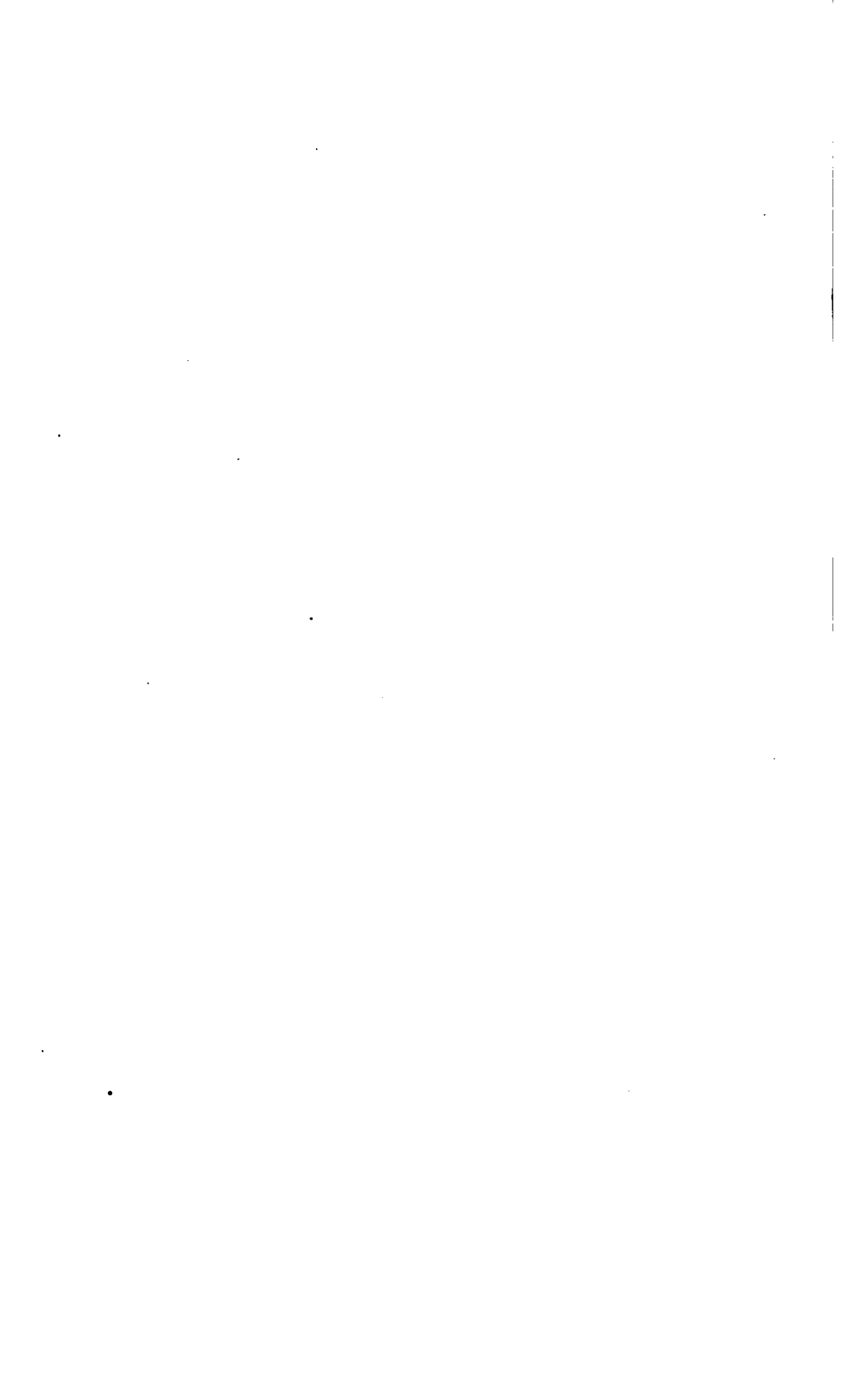
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